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No. 95

In the Supreme Court of the United States

OCTOBER TERM, 1955

JUDSON GRIFFIN AND JAMES CRENSHAW, *Petitioners,*

v.

PEOPLE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONERS

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allowed, and certified by the court. When this is done the record consists of all proceedings in the case from the time of the convening of the court until the termination of the trial."

* * * * * *

"Therefore, when the review is had upon the common-law record, the sole matter only that may be considered by the court is error appearing upon the face of the record, and matters may not be added by argument, affidavit, or otherwise, to supply or expand the record. The case must stand or fall upon the errors appearing in the record. Of course, where there is a bill of exceptions, which includes motions, evidence, rulings on evidence, instructions, and the like, and such bill of exceptions is made a part of the record, errors may be reached by the remedy of writ of error."

There has been no disposition whatever by the Illinois Supreme Court to expand the narrow limits of review on the mandatory record. To raise the basic question of the sufficiency of the evidence to support the verdict, for example, the evidence must be included in a bill of exceptions or stenographic report certified by the trial judge. *People v. Johns*, 388 Ill. 212, 57 N.E. 2d 895 (1944). Such a bill of exceptions or report must be not only correct but complete, and include "all proceedings in the case from the time of the convening of the court until termination of the trial". *People v. Mc-*

Kinley, 409 Ill. 120, 124, 98 N.E. 2d 728, 730 (1951); *People* v. *O'Connell*, 411 Ill. 591, 104 N.E. 2d 825 (952).[1] Efforts by defendants to raise other trial errors by writ of error on the mandatory record, supplemented in various ways, have been invariably rejected. See, *e.g.*, *People* v. *Geddes*, 396 Ill. 522, 72 N.E. 2d 191 (1947); *People* v. *Sinclair*, 413 Ill. 100, 107 N.E. 2d 788 (1952). Indeed, the rigid limitation of the scope of appellate review on the mandatory record in Illinois has been sustained in this Court even when constitutional issues were at stake, though not without sharp dissents. *Carter* v. *Illinois*, 329 U.S. 173; *Foster* v. *Illinois*, 332 U.S. 134.

On *constitutional* issues—issues of denial of constitutional rights at the trial such as were raised by the claims of denial of counsel in the *Carter* and *Foster* cases—the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1953, c. 38, sec. 826-832) does provide a method

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[1] In Miller v. United States, 317 U.S. 192, the Court, after pointing out that historically a bill of exceptions did not embody a verbatim transcript of the evidence, stated that a bill could be prepared (p. 198) "from notes kept by counsel, from the judge's notes, from the recollection of witnesses as to what occurred at the trial, and, in short, from any and all sources which will contribute to a veracious account of the trial judge's action and the basis on which his ruling was invoked." In Illinois, the Supreme Court has recognized that, as a practical matter, the indigent defendant has no such alternate route. To a claim that a defendant had waived his right to object to admission of a coerced confession by failure to seek a direct review of his conviction in a "constructed or 'bystander' bill of exceptions," the court replied: "We think, however, that in view of defendant's incarceration and his uncontroverted allegation of indigence, this alternative method of bringing up the record for review was not, as a practical matter, available to him." People v. Joyce, 1 Ill. 2d 225, 230, 115 N.E. 2d 262, 265 (1953). See also *infra*, pp. 17-18.

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OPINIONS BELOW

No opinions were written either by the Criminal Court of Cook County, Illinois, or by the Supreme Court of Illinois. The order entered by the former appears at R. 8-9; the order entered by the latter at R. 13.

JURISDICTION

Jurisdiction of this Court is invoked under the provisions of U.S.C., Title 28, Sec. 1257 (3). The federal question was raised at the outset by the motion filed in

the Criminal Court of Cook County seeking a transcript of the proceedings, without cost, of the trial at which petitioners were convicted. (R. 3), and was renewed in petitioners' petition under the Illinois Post-Conviction Hearing Act (R. 11), and in their petition for writ of error filed in the Supreme Court of Illinois (R. 4). The Supreme Court of Illinois expressly ruled upon, and rejected, petitioners' claims under the Federal Constitution. R. 13. The order of that court is final by its terms. The order was entered on November 18, 1954 (R. 13), and the petition for certiorari was filed on January 10, 1955.

STATUTES INVOLVED

The texts of the relevant sections of the Constitution of the United States, the Illinois Revised Statutes and Federal statutes are set out in Appendix A, *infra*.

QUESTION PRESENTED

Illinois gives to all criminal defendants the right to full appellate review of the proceedings in which they have been convicted. There is no way in which this right can be exercised by defendants who are unable to pay for a transcript of the proceedings in the trial court, except only that defendants who are sentenced to death are provided with a transcript without cost. Does the failure of Illinois to provide for petitioners, who are indigent but not sentenced to death, any method by which they may avail themselves of this general right of appellate review deny to petitioners either the equal protection of the laws, or due process of law, as guaranteed to them by the Fourteenth Amendment?

STATEMENT

The allegations of petitioners' petition under the Illinois Post-Conviction Hearing Act (R. 9-11) were not controverted in respondent's motion to dismiss (R. 12-13), and there appears to have been no challenge to the allegations of petitioners' petition in the Supreme Court of Illinois (R. 1-4), nor is there any suggestion that they were not accepted as accurate by the court below. R. 13. The facts alleged in the two petitions are not in conflict, and may be summarized as follows:

Petitioners were indicted on a charge of armed robbery in the Criminal Court of Cook County, Illinois. After trial as co-defendants at a bench trial they were both convicted, and on December 29, 1953, petitioner Griffin was sentenced to a term of not less than five nor more than ten years in the Illinois State Penitentiary. Petitioner Crenshaw was sentenced on the same day to a term of not less than ten nor more than fifteen years. R. 2, 9-10.

Following the entry of judgment in the trial in which petitioners were convicted, petitioners' motions for a New Trial and in Arrest of Judgment were overruled. R. 2. Thereafter petitioners filed a motion entitled "Motion for Transcript of Proceedings and Court Records Without Cost", in which, in substance, they alleged (R. 3): (a) that the record and transcript were needed to enable them to file a bill of exceptions and to prosecute a direct appeal to the Illinois Supreme Court; (b) that they verily believed that there were appealable errors and substantial infractions of constitutional rights under the State and Federal Con-

stitutions that merited appellate review; (c) that they were poor persons with no means of paying the fees necessary to acquire the transcript and court records needed to prosecute an appeal from their convictions; (d) that had petitioners been under sentence of death, the State would have provided a complete certified transcript without cost in order that they might prosecute an appeal; and (e) that petitioners, both in that they were not accorded the same treatment as those under sentence of death, and in that the State failed to provide them with a transcript without cost in order to prosecute their appeal or writ of error as of right, were denied rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This motion was denied, without hearing, by the Chief Justice of the Criminal Court of Cook County on February 2, 1954. R. 3, 10.

On April 26, 1954, petitioners filed in the Criminal Court of Cook County a petition under the Illinois Post Conviction Hearing Act (Ill. Rev. Stat. 1953, c. 38, secs. 826-832). R. 9-11. The petition recited essentially the same facts as were set forth in their earlier Motion for Transcript, and alleged the same violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Respondent moved to dismiss, asserting that the petition failed to allege any substantial violation or substantial denial of a constitutional right under either the United States or the Illinois Constitutions (R. 12-13), and on July 1, 1954, the petition was dismissed. R. 8.

Thereafter, on October 14, 1954, petitioners filed a petition for a writ of error to the Supreme Court of

Illinois (R. 1-4), together with an affidavit that they were without funds and a prayer for leave to proceed *in forma pauperis*. R. 1. Their petition urged (R. 2) that "Denial of the stenographic report of trial proceedings to an indigent defendant is a denial of the equal protection clause of the Fourteenth Amendment to the United States Constitution in a State which has a system of criminal appeals", and that the trial court erred in dismissing their petition. The Supreme Court, although granting petitioners leave to proceed as poor persons (R. 13), denied the writs of error on November 18, 1954. R. 13. The court stated (R. 13):

> "Petitioners' sole contention is that they were deprived of due process of law and the equal protection of the laws, in that they were financially unable to purchase a bill of exceptions and were, therefore, unable to obtain a complete review by this Court.
>
> "This charge presents no substantial constitutional question and the Writs of Error are, therefore, denied."

The petition for writ of certiorari was filed on January 10, 1955. No response was filed by respondent. Certiorari was allowed on May 23, 1955. R. 14.

SUMMARY OF ARGUMENT

I

Illinois law provides generally for appellate review of all criminal convictions, but includes no procedure by which an indigent defendant, except one sentenced to death, can secure without cost the transcript which

is indispensable to full appellate review. See *Jennings v. Illinois*, 342 U. S. 104, 109-110. The appellate review which can be had on the record which the clerk is required to keep in every case—the indictment, arraignment, plea and sentence—is limited strictly to errors which appear on that record, and neither the recent Post-Conviction Hearing Act nor the extraordinary writs of habeas corpus and coram nobis provide any alternative method of appellate review. The Supreme Court of Illinois recognizes that when a criminal defendant is indigent, he has no way to secure a full review of his conviction. *People v. La Frana*, 4 Ill. 2d 261, 266, 122 N. E. 2d 583, 585-586 (1954).

II

The disadvantage to petitioners resulting from the fact that in Illinois criminal defendants with funds, or ones sentenced to death, may secure full appellate review of their convictions, while petitioners, lacking the funds necessary to purchase a transcript, may have only the limited review available on a mandatory record, is obvious. Moreover, there is no doubt that the disadvantage is significant. *Boykin v. Huff*, 121 F. 2d 865, 872 (D. C. Cir., 1941). Statistics so demonstrate if proof be necessary.

Likewise, there can be no doubt that, despite the statutory origin of the right to appeal, its discriminatory denial is condemned by the Equal Protection Clause of the Fourteenth Amendment. Two recent decisions of the Court have put that issue beyond further argument. *Cochran v. Kansas*, 316 U.S. 255; *Dowd v. Cook*, 340 U.S. 206.

A

We believe that the difference in the right to appeal which exists in Illinois between the indigent and the non-indigent criminal defendant is a discriminatory denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. Many decisions of the Court attest to the principle that all persons "should have like access to the courts of the country for the protection of their persons and property". *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Missouri* v. *Lewis*, 101 U. S. 22; *Chambers* v. *Florida*, 309 U. S. 227. This includes, of course, appellate courts. *Cochran* v. *Kansas*, 316 U. S. 255; *Dowd* v. *Cook*, 340 U. S. 206. There are no decisions of the Court which sanction a discrimination in the availability or standard of justice between the indigent and those with funds. There is, however, in one notable area, a series of decisions in which the Court has been alert to prevent the indigence of the defendant from prejudicing him before the courts—the cases dealing with the right to counsel. *Powell* v. *Alabama*, 287 U. S. 45; *Betts* v. *Brady*, 316 U. S. 455. Although it is unfortunately true that the indigent criminal defendant, and even the criminal defendant of modest means, suffers handicaps in defending against a criminal charge, the Court should not sanction clear discrimination against an indigent defendant simply because it is powerless to eliminate all of his disadvantages.

B.

Moreover, Illinois discriminates even among indigents in supplying a free transcript to one group

those whose sentence is death. This discrimination may not be as unreasonable as that between the indigent and non-indigent, but it is another aspect of the fundamental unfairness accorded petitioners. Although in various ways the law recognizes the difference between capital and other offenses, and capital and other punishments, *Williams* v. *Georgia*, 349 U. S. 375, 391, the difference cannot be a basis for discrimination in the availability or quality of justice. The Constitution shows no less solicitude for liberty than for life. *Bute* v. *Illinois*, 333 U. S. 640, 681.

III

While we believe petitioners are entitled to relief under the Equal Protection Clause, we also believe that the discrimination to which they are subjected is violative of due process. *Cf. Bolling* v. *Sharpe*, 347 U. S. 497, 499. Although it may be that Illinois was not compelled by the Due Process Clause to afford appellate review in criminal cases, having done so, its appellate procedures are required to comply with the requirements of due process. *Frank* v. *Mangum*, 237 U. S. 309, 327; *Cole* v. *Arkansas*, 333 U. S. 196.

There are only a limited number of cases in the Court which define the limits of due process as applied to appellate procedure. Such as they are, they indicate the denial of due process to petitioners. *Price* v. *Johnston*, 334 U. S. 266; *Foster* v. *Illinois*, 332 U. S. 134. Moreover, when the discrimination against petitioners is tested by the basic standard of due process—fundamental fairness—it stands condemned.

The development of criminal law and criminal pro-

cedure is of some relevance, although in the last analysis the issue must be resolved in the light of the present situation. *Brown* v. *Board of Education*, 347 U. S. 483. Historically, the idea of equality before the law for rich and poor alike is fundamental and is a tenet of the Magna Carta itself. In early criminal procedure, this rule was given dubious fulfilment by denying to both rich and poor the right to counsel, as well as the right to appeal a conviction. In America, the right to counsel in criminal cases was recognized, but not necessarily the right of indigent criminal defendants to have counsel appointed for them. *Betts* v. *Brady*, 316 U.S. 455, 466. Yet in our developing criminal law, and in the parallel development of our ideas of fundamental fairness, we now recognize that counsel must be supplied by the State whenever a defendant would be prejudiced by his inability to retain counsel. *Foster* v. *Illinois*, 332 U. S. 134.

The story of appellate review in criminal cases likewise demonstrates that we are now unwilling to permit an indigent to suffer discrimination because of his inability to pay the costs of the new appellate procedures which have been provided. This is a possibility of discrimination of relatively recent orgin: full appellate review of a criminal conviction is itself a recent development, and the discrimination is in part a function of stenographic court reporting, which is even more recent. Yet at the present time the Federal government and the overwhelming majority of the States, as well as England and the Commonwealth countries, have made provisions which prevent discrimination between rich and poor in the ability to utilize these new

appellate procedures. The substantially universal judgment evidenced by these provisions that this discrimination is fundamentally unfair supplies the necessary "objective standards" of due process—"the laws and practices of the community taken as a gauge of its social and ethical judgments". *District of Columbia* v. *Clawans*, 300 U. S. 617, 628. Neither their lack of exact uniformity nor their relatively recent origin weakens their significance. Finally, if it be significant, the experience with such provisions demonstrates that provisions by which an indigent defendant may obtain the same appellate review as the non-indigent is neither impractical nor a burden on the appellate court system.

IV

The proper remedy in this case, as in *Dowd* v. *Cook*, 340 U. S. 206, is an order reversing the decision below with instructions that petitioners should be accorded the full appellate review of their convictions that has heretofore been denied them because of their indigence; or in the alternative that they be discharged from custody.

ARGUMENT

I

PETITIONERS, BEING INDIGENT, ARE DENIED APPELLATE REVIEW OF ALLEGED ERRORS IN THE PROCEEDING LEADING TO THEIR CONVICTION

Illinois practice in criminal appeals, and the application of its practice to indigent defendants, was recently reviewed by this Court in *Jennings* v. *Illinois*, 342

U.S. 101, and does not appear to be in dispute. Nonetheless, since the practice lies at the heart of petitioners' claim, a brief summary of the provisions of law which govern appellate review of criminal cases in Illinois is warranted.

The procedure for appellate review of the trial of a criminal defendant in Illinois is by writ of error. The basic grant is contained in Illinois Revised Statutes 1953, c. 38, sec. 769.1 (see Appendix A, p. 78): "Writs of error in all criminal cases are writs of right and shall be issued of course."

The record on review on writ of error in criminal cases may be either what is known as the clerk's mandatory record—of which more below—or the entire proceedings in the trial court. When review of alleged errors at the trial is sought, the writ of error can bring the trial record, including the transcript of proceedings, before the Supreme Court of Illinois. The procedure by which this is done is outlined in Rule 70A of the Rules of The Supreme Court of Illinois, adopted pursuant to statutory authority, which provides (Ill. Rev. Stat. 1953, c. 110, sec. 259.70A, Appendix A, *infra*, p. 78):

> "In all criminal cases in which writ of error is brought, the bill of exceptions or report of the proceedings at the trial, if it is to be included in the record on review, shall be procured by the plaintiff in error and submitted to the trial judge or his successor in office for his certificate of correctness, and filed in the trial court within one hundred (100) days after the judgment was entered . . ."

The report of the proceedings is obtained from the court reporter who, under Illinois law, "shall take full stenographic notes of the evidence" and shall furnish a transcript of these notes to a party requesting it at a "charge not to exceed twenty cents per one hundred words." Ill. Rev. Stat. 1953, c. 37, sec. 163b (See Appendix A, p. 76). This charge must be borne by the defendant, with the sole exception of a "prosecution for a capital offense, where the sentence is death"; the cost in such a case, if the trial court is "satisfied that the person convicted is a poor person and unable to prosecute his writ of error and pay the costs and expenses thereof," is then assumed by the county in which the conviction was had. Ill. Rev. Stat. 1953, c. 38, sec. 769a (see Appendix A, p. 78).

The effect of these provisions on defendants, such as petitioners here, who are indigent and hence cannot file with the trial court for its approval as the record on appeal a bill of exceptions or a transcript of the proceedings at the trial, was concisely summed up by this Court in the *Jennings* case (342 U.S. at pp. 109-110):

> "While Illinois provides a transcript without cost to indigent defendants who have been sentenced to death, in the absence of some Illinois procedure to permit other indigent defendants to secure an adequate record petitioners could utilize the writ of error procedure only by purchasing the transcript within the limited period following conviction. Since petitioners have taken paupers' oaths, the Attorney General of Illinois concedes that writ of error has not been available to review their claims * * *."

As already noted, a writ of error may also be prosecuted on what is known as the mandatory record which the clerk makes in every case—the indictment, arraignment, plea and sentence. On this record, of course, errors in the trial itself, such as those which petitioners allege, are not brought before the appellate court since it contains nothing which would reveal what had occurred. The nature of a writ of error on a mandatory record—and the contrast between such an appeal and one on a bill of exceptions or a transcript—was stated by the Supreme Court of Illinois in a response to this Court's decision in *Loftus* v. *Illinois*, 334 U.S. 804. In a definitive statement of the limited nature of the appellate review which is available to the defendant on only the mandatory record, as contrasted with the full record of the proceedings in the trial court, the Illinois court said (*People* v. *Loftus*, 402 Ill. 432, 433-434, 84 N.E. 2d 495, 497, 498 (1948)):

> "The record in the trial court may consist only of the mandatory record, *viz.*, indictment, arraignment, plea, trial and judgment. *Callen* v. *Stevens*, 389 Ill. 35. This appears in the clerk's record in every case, whether there is a plea of guilty or a trial. The record may include also a bill of exceptions, which consists of all of the motions and rulings of the trial court, evidence heard, instructions, and other matters which do not come directly within the clerk's mandatory record. This may be only a part of the record on review when a bill of exceptions is prayed and

by which an indigent defendant can secure appellate review of the alleged denial of his constitutional rights even though he is unable to afford the bill of exceptions and transcript of proceedings required by the review on writ of error.[2] When a petition is filed under that act a transcript of all or part of the evidence at the trial at which the petitioner was convicted will be provided without cost to a petitioner if the judge determines that the petition alleging a denial of a constitutional right is sufficient to require an answer, and if either the State's Attorney or the court requests it. Ill. Rev. Stat. 1953, c. 37, sec. 163f (see Appendix A, p. 77). This provision of the Post-Conviction Hearing Act, however, has no application to the claim now made by petitioners. The denial of constitutional rights of which they now complain concerns only the denial of their motion for a transcript, not the other prejudicial errors which they assert a transcript will reveal.[3] The post-convic-

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[2] The specific problem of the defendant's right to be represented by counsel and his understanding of the consequences of a plea of guilty—the problem with which this Court was concerned in 1946 and 1947 in the *Carter* and *Foster* cases—was also met by a 1948 amendment to the Rules of the Illinois Supreme Court which required the transcript of the arraignment proceedings to be made a part of the mandatory record. Rule 27A; Ill. Rev. Stat. 1953, c. 38, sec. 259.27A. In 1953, the Illinois legislature amended the Court Reporters' Act (Ill. Rev. Stat. 1953, c. 37, sec. 163a-163b) to provide compensation to official court reporters for preparing the transcripts of proceedings required by this Rule. Ill. Laws 1953, p. 859, 860.

[3] Petitioners' Motion for Transcript, filed in the trial court (R. 3) alleged that there were both appealable errors and substantial infractions of their constitutional rights in the course of the proceedings in the trial court. As to the latter, the Post-Conviction Hearing Act provided a remedy. The prejudice to which they now are subject, and which forms the basis for their present claim,

tion hearing is concerned only with constitutional issues, not with trial errors of the nature open to normal appellate review on a full bill of exceptions, such as rulings on evidence, the content of the judge's charge, or the sufficiency of the evidence to support the verdict. As the Supreme Court of Illinois has recently stated (*People* v. *Wakat*, 415 Ill. 610, 617, 114 N.E. 2d 796, 710 (1953)):

> "Beginning with People v. Dale, 406 Ill. 238, our decisions have made it clear that a post-conviction proceeding is not an appeal or a limited review by an intermediate court, but is an original proceeding in which a petitioner who complies with the requirements of the statute is entitled to a full judicial hearing upon the merits of the constitutional claims asserted."

Illinois does, of course, retain the remedies of writ of habeas corpus and the writ of error coram nobis. The former, an independent remedy based upon Ill. Rev. Stat. 1953, c. 65, sec. 22(1), tests the jurisdiction of the court; the latter, based upon Ill. Rev. Stat. 1953, c. 110, sec. 196, is also an independent original proceeding in which there may be presented for consideration only such matters as were not known to the trial court at the time of the trial and which, had they been known, would have prevented the entry of the judgment which was entered. *People* v. *Loftus*, 400 Ill. 432, 435, 81 N.E. 2d 495, 498 (1948); *People* v. *Tuohy*, 397 Ill. 19, 72 N.E. 2d 827 (1947). Neither of these, of course, is a substi-

results from their inability to secure a review of the alleged errors in the trial which, while they might require a reversal of their convictions, were not denials of constitutional rights.

tute for review on a full bill of exceptions by writ of error. Indeed, in recent cases the Illinois Supreme Court has recognized that neither these remedies, nor the Post-Conviction Hearing Act, provide an indigent prisoner with a procedure by which his conviction can be reviewed. In *People* v. *La Frana*, 4 Ill. 2d 261, 122 N.E. 2d 533 (1954), the court, in rejecting a claim by the State that the alleged violation of constitutional rights resulting from improper admission of an alleged confession was not open in a proceeding under the Post-Conviction Hearing Act because it had been fully considered and ruled upon by the trial judge in the trial itself, stated (4 Ill. 2d at 266, 122 N.E. 2d at 585-586):

> "Since the defendant raised the claim at the trial, there was no waiver, *and since he was precluded by indigence from securing a direct review of his conviction*, the decision of the trial court that his confession was voluntary is not *res judicata*." (Initial italics supplied.)

See also *People* v. *Jennings*, 411 Ill. 21, 25, 102 N.E. 824, 826-827 (1952); *People* v. *Wakat*, 415 Ill. 610, 616, 114 N.E. 2d 706, 709 (1953).

* * * * *

The issue, thus, appears to be squarely posed: petitioners are unable to secure appellate review of the "manifest error in the record and proceedings in which they were convicted" (R. 4) because they lack funds to obtain a transcript and have it filed as a bill of exceptions. Does that situation, in which they are placed by the laws of Illinois, deny them any constitutional rights?

To that issue we now turn.

II

ILLINOIS LAW DENIES TO PETITIONER THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Review of the constitutional validity of State court criminal procedures is among the most difficult and delicate duties imposed upon this Court. The genius of our Federal system has been the diversity which stems from differences in background, in approach, in judgment, but which, by the multitude of experience which it provides, has stimulated progress and ever higher standards. No one asserts that the Fourteenth Amendment was intended to smother this development in a procedural strait-jacket which would deprive the States of all power to resolve their local procedural problems in their own ways.

Yet, when that is said, there nonetheless remains an area in which the judgments of State legislators and State courts cannot prevail. The mandates of the Fourteenth Amendment do provide outer limits to the permissible range of procedural variations under the Constitution. Just where those limits may be is not a matter of definition: they are rather pricked out from time to time by the decisions of this Court. They may, indeed, change as times change and circumstances are altered.

What is significant for present purposes is not the precise line which marks the limit to which a State may go, but that in this case the law of Illinois is far beyond any permissible boundary. The gross discrimination between indigent criminal defendants and

others similarly situated but not so unfortunate is one which cannot be justified. We believe that even though it represents the deliberate judgment of the State of Illinois, the discrimination against these petitioners denies to them both the equal protection of the laws and the due process of law to which they are entitled by the Fourteenth Amendment. We deal in this Point II with the application of the Equal Protection Clause. Point III will deal with the application of the Due Process Clause.

There is no need for elaborate analysis of the nature of the disadvantage to petitioners resulting from the fact that in Illinois a criminal defendant *with* adequate funds may secure as of right a full appellate review of every aspect of the proceedings in the trial court whereas the criminal defendant *without* the necessary funds may have only that limited review which is available on the mandatory record, or which is necessary to determine whether constitutional rights have been denied. The description of the Illinois law in Point I, *supra*, is self-explanatory. Trial errors—the propriety of the admission or exclusion of evidence, the accuracy and adequacy of the judge's charge to the jury, prejudicial conduct by either the judge or the prosecuting officials, the adequacy of the evidence to support the verdict, to name only a few of the most important—are corrected by appellate procedures in Illinois *unless* the defendant is indigent. For the indigent defendant there is no such thing as a trial error; his sentence must nonetheless be served. Only if there is some fault in the trial court proceedings which can be determined by an examination of the mandatory record

is the right of appeal accorded him meaningful at all. The defendant with funds can, in short, have a full review on the merits; the indigent cannot.

That this is inequality cannot be gainsaid. Nor can it be gainsaid that the inequality is significant. Trial judges, in Illinois as elsewhere, are human. Because of that, Anglo-American jurisprudence now almost universally provides a method for reviewing and correcting trial errors in criminal as well as civil cases. See [redacted] pp. 49-51. That Illinois provides such a method of review, for those who can afford it, is itself significant recognition that the possibility of such errors cannot be ignored.

The significance of appellate review need not, however, rest upon *a priori* arguments. Statistical evidence, albeit fragmentary, provides a measure of its importance. In Illinois, the biennial reports of the Attorney General show the following with respect to appeals in criminal cases.[4]

	Total Decided	Aff'd	Rev'd	Rev'd and Remanded	% Not Aff'd
1949-1950	121	89	10	22	26.4
1951-1952	140	115	8	27	25
1953-1954	136	82*	10	40**	37.9

These figures, showing an average of nearly 30 percent of reversals during the six-year period, indicate some reduction from the percentages of earlier years. From 1900 to 1910, there were reversals in 37.3 percent of the criminal appeals in Illinois; from 1919 to 1926 there were reversals in 36.6 percent. See 42 Harv. L. Rev.

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[4] Biennial Rep. Ill. Atty. Gen. (1950, 1952, 1954).

* Including 2 cases in which the writ of error was dismissed.

** Including 6 cases remanded on confession of error.

566, 567 (1929). For the years 1917 to 1929 the percentage of reversals was 41%. (Figure supplied by Librarian, Institute of Judicial Administration. And for the years from 1922 to 1936 the percentage of cases not affirmed was 43.2 percent. See 27 J. Crim. Law and Criminology 929 (1937).

The percentages of reversals, of course, relate only to the cases which were in fact reviewed on appeal; they do not show that there is reversible error in that same percentage of all criminal convictions. It is also true that the figures in the reports of the Attorney General of Illinois, from which those percentages are derived, do not distinguish between the reversals which were, or could have been, based on the clerk's mandatory record, and reversals in which only full review on a bill of exceptions revealed the fatal defects in the proceedings in the trial court. To evaluate in some degree the significance of this distinction we have examined, case by case, all of the reported cases in which the Illinois Supreme Court reversed a conviction on appeal during the last two years, 1953 and 1954.[1] In 1953, there were 21 such cases, and in 1954 there were 13, for a total of 34. Of these, not more than four, and perhaps only two, were reversals which would have been obtained had the review been had on the clerk's mandatory record alone, without a bill of exceptions. The 34 cases are listed, with a brief description of the

[1] Only the reports of the Illinois Supreme Court were examined since all felony convictions, as well as certain other convictions, are reviewed only by that court. Ill. Rev. Stat. 1953, c. 38, sec. 780½.

nature of the reversible error found in each case by the Illinois Supreme Court, in Appendix B, *infra*.

Those statistics, of course, cannot show the extent to which reversible error is present in cases in which, because of the indigence of the defendant, no review of his conviction is possible, and none is had. One can reasonably conclude, however, that the likelihood of reversible error in such cases is probably greater than it is in cases in which the defendant is financially able to exercise his right to a full appellate review.

We say "probably greater" because in the vast majority of criminal proceedings in Illinois in which no appeal on the merits is possible, that fact must be apparent no later than the time when the defendant is arraigned. A defendant who appears without counsel, and advises the trial court that he is without funds to employ counsel, has in effect announced that if convicted he is powerless, by reason of indigence, to challenge the proceeding in the trial court which led to his conviction. Perhaps it can be said that in such cases both trial court and prosecutor will sense such a great obligation to such a helpless defendant that together they will see to it that no prejudicial error occurs. Yet even when such a sense of special obligation exists, it cannot guarantee an absence of prejudice. Such, indeed, must have been the basis for the general adoption of appellate procedures in criminal cases—a consensus that error prejudicial to the defendant cannot be avoided by imposing the ultimate responsibility on the prosecutor and the trial court.

Moreover, there is no guarantee to the defendant that the trial will be conducted with any such sense of

special obligation. Some prosecutors and trial court judges may feel less, rather than more, need for care when what they do is not subject to later assessment and criticism by the Illinois Supreme Court. Even in cases in which the cautionary sanction of appellate review is not absent, and the convictions are in fact reviewed on appeal, the Illinois reports show that convictions have been reversed because of an abuse of discretion by the trial court judge, or because of his prejudicial remarks or prejudicial examination of witnesses, or his tacit approval of improper conduct by the prosecution. They show similar reversals because State's Attorneys have conducted themselves in an improper manner, or have asked obviously improper questions merely to create prejudice against the defendant. See early cases collected in 42 Harv. L. Rev. 566, 568 (1929), and recent cases in Appendix B, *infra*. One cannot conclusively assume that freedom from appellate review will eliminate such happenings. One can almost conclusively assume the contrary.

We should add that there is in this no intention of suggesting that Illinois can or should be singled out for special criticism of the conduct of its criminal trials. Although statistics concerning reversals on appeal in criminal cases are not generally available, and while the differences between jurisdictions as to the scope of review make comparison on an exact basis impossible, such figures as we have found for jurisdictions other than Illinois show percentages of reversals which generally approach those for Illinois. In the Federal courts, for example, reversals in criminal cases for the decade 1946-1955 ranged from 13.8 percent

in 1952 to 26.4 percent in 1955, with an average for the 10 years of 20.5 percent. See Table 13, *Annual Reports*, 1946-1955, Director of the Administrative Office of the United States Courts. Similar studies covering various periods since 1900, suggest that the figures are not greatly different elsewhere.[6]

Enough has been said, we believe, to validate the conclusion of Judge Edgerton in *Boykin v. Huff*, 121 F. 2d 865, 872 (D.C. Cir. 1941):

> "The right of appeal, though statutory, is not insubstantial, and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily."

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[6] From 1887 to 1922, something less than 15 percent of criminal appeals in New York were successful. Rep. N.Y. Crime Comm. (1927), p. 45. In California, from 1900 to 1926, the percentage ranged from 12.6 percent to 22.5 percent. See Vernier and Selig, The Reversal of Criminal Cases in the Supreme Court of California, 2 So. Calif. L. Rev. 21, 26 (1928). From 1907 to 1912 the following percentages of reversals were obtained in courts of appeal in criminal cases: Wisconsin 30 percent, Illinois 37.4 percent, Iowa 26 percent, Michigan 31 percent, Massachusetts 23 percent, New Hampshire 22 percent, Kansas 20 percent, South Dakota 30 percent, California 20 percent, Georgia 16 percent. 3, J. Crim. Law and Criminology 569 (1913). In Ohio for the period July 1, 1930, to December 31, 1930, 22 percent of criminal cases appealed were reversed. Harris, Appellate Courts and Appellate Procedure in Ohio (1933), p. 86. The Librarian of the Institute of Judicial Administration, Inc., has supplied us with the following figures: In Connecticut, in 1954, 17 percent of criminal convictions appealed were reversed; in Kansas, for the years 1952-1953, 12 percent of the criminal convictions were reversed; in Kentucky, in 1954, 23 percent were reversed; in Washington, in 1952, 13 percent were reversed, and in 1953, 25 percent were reversed; in Wisconsin, in 1952 and 1953, the percentage of reversals was 40; and in New York County for the years 1946 through 1948, the percentage of reversals was 17.4.

Quite obviously, those criminal defendants who have the opportunity of full review of the proceedings in their trial have a measurably greater chance of retaining their life and liberty than those to whom, for any reason, that appellate review is denied. Whatever be the precise measure of this advantage, certainly it is "not insubstantial".

There remain, then, two questions. First, is there any basis, either in the statutory origin of the right of appeal in criminal cases, or in its intrinsic characteristics, which removes it from the operation of the Equal Protection Clause of the Fourteenth Amendment? Second, in the event the answer to the first question is in the negative, is there any basis upon which the classifications made by the Illinois statutes, which result in the deprival of petitioners' right of appeal, can be justified? We submit that the answer to both questions is no.

The first question is easily answered. Two recent decisions of the Court hold squarely that a discriminatory denial of the right of appeal is condemned by the Equal Protection Clause. In each case prison officials had so limited a prisoner's contact with the world outside the prison as to make it impossible for the prisoner to file his appeal papers within the time permitted by law. That this denied the prisoners the equal protection of the laws was regarded by the Court as so patent as literally to be beyond argument. Mr. Justice Black, speaking for a unanimous court, said (*Cochran* v. *Kansas*, 316 U.S. 255, 257):

> "The State properly concedes that if the alleged facts pertaining to suppression of

> Cochran's appeal were disclosed as being true before the supreme court of Kansas, there would be no question but that there was a violation of the equal protection clause of the Fourteenth amendment'."[7]

Again, in *Dowd* v. *Cook*, 340 U.S. 206, 208, the Court unanimously asserted "that a discriminatory denial of the statutory right of appeal is a violation of the Equal Protection Clause of the Fourteenth Amendment". The *Dowd* case, however, affords a more enlightening example of the type of discriminations in connection with the right to appeal in criminal cases which fall under the constitutional ban. There, the State had so modified its appellate procedure as to afford, in the discretion of the court, a right to a delayed appeal for convicted defendants who had been unable to make a timely filing of appeal papers because of restrictive prison rules. This limited, discretionary right to appeal, available to a class of defendants, in contrast to the absolute right of appeal accorded other defendants, was likewise held to be a denial of equal protection. The Court, in remanding the case with instructions to

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[7] To the same effect is Agnew v. Superior Court, 118 Cal. App. 2d 230, 234, 257 P. 2d 661, 663 (1953), in which the Court stated:

> "It is axiomatic that one who takes a timely appeal is entitled to perfect it, and to suppress the exercise of such right amounts to denial of equal protection of the law, because the Fourteenth Amendment of the Constitution of the United States prohibits any such suppression. The petitioner * * * was entitled to have a clerk's and reporter's transcript prepared and it was the duty of the court to order their preparation."

release the defendant unless the State afforded him an appeal, stated (340 U.S. at p. 209):

> "The record shows that respondent's delayed appeal was denied in 1946, apparently as a matter within the state court's discretion. Consequently, respondent has never had the same review of the judgment against him as he would have had as of right in 1931 but for the suppression of his papers."

Discriminatory limitation on the right of appeal generally accorded is therefore a denial of equal protection in violation of the Fourteenth Amendment. There remains the question whether petitioners are subject to any such discriminatory limitation by the laws of Illinois. This is the question which Mr. Justice Frankfurter reserved in his dissenting opinion in *Jennings* v. *Illinois*, 342 U.S. 104, 114:

> "Is then the Federal claim the denial by Illinois of stenographic minutes of a trial to an indigent defendant? I appreciate that such a denial might be found to be in violation of the Fourteenth Amendment, and more particularly of its Equal Protection Clause, in a State which has a system of criminal appeals."

We believe that the decisions of this Court, though they do not supply the same categoric answer as they do for the first question discussed above, leave no real doubt that the petitioners have been denied the equal protection of the laws to which the Fourteenth Amendment guarantees them.

A. Illinois' Discrimination Between Indigent and Non-Indigent Defendants Violates the Equal Protection Clause.

Seventy years ago this Court wrote that the guarantee of equal protection of the laws in the Fourteenth Amendment "undoubtedly intended" that all persons "should have like access to the courts of the country for the protection of their persons and property". *Barbier* v. *Connolly*, 113 U.S. 27, 31. Even earlier, the Court had said that, in respect to the courts, equal protection of the laws is given when "all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress". *Missouri* v. *Lewis*, 101 U.S. 22, 30. See also *Republic Pictures Corp.* v. *Kappler*, 151 F. 2d 543, 547 (8th Cir. 1945), *aff'd, per curiam*, 327 U.S. 757. Nor do these statements mean that equal protection is given only with respect to access to courts of first instance, not to courts of appeal. Since *Cochran* v. *Kansas*, 316 U.S. 255, and *Lloyd* v. *Cook*, 340 U.S. 206, there can be no doubt as to that.

Nor can these expressions by the Court mean that access to the courts may be denied to the poor, while available to the wealthy. Everything in the tradition of American jurisprudence denies the constitutional validity of that classification. As Mr. Justice Jackson stated in his concurring opinion in *Edwards* v. *California*, 314 U.S. 160, 184-185, in which the Court struck down a California statute making it a crime to bring, or assist in bringing, an "indigent" into that State:

> "Indigence in itself is neither a source of rights nor a basis for denying them. The mere

state of being without funds is a neutral fact constitutionally an irrelevance, like race, creed, or color."

To make of indigence a valid basis for distinction in the availability of justice "flouts the basic principle that all people must stand on an equality before the bar of justice in every American court." *Chambers* v. *Florida*, 309 U.S. 227, 241.

It is wholly consistent with these decisions, and with the tradition of American law, that so far as we are aware there are no decisions by this Court which sanction a discrimination in the availability or standard of justice between the indigent and those with adequate funds.[9] Indeed, in one notable area, the

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[8] Early decisions which had sanctioned state limitations on the entry of paupers within their boundaries, such as City of New York v. Miln, 11 Pet. 102, were expressly overruled. See 314 U.S. at pp. 176-177.

[9] In Carr v. Lanagan, 50 F. Supp. 41 (D. Mass. 1943), a writ of habeas corpus was denied a prisoner who alleged that he was unable to obtain a writ of error to the Supreme Judicial Court of Massachusetts because he did not have the $3 filing fee, and Massachusetts had no provision for forma pauperis proceedings by which it could be waived. The court held that this was not a denial of equal protection of the laws, stating (p. 43): "It is reasonable to require a filing fee. The amount is small." No doubt there is a distinction between a small filing fee, which even an indigent could be expected to provide, and a substantial bill for a record, which at 20 cents per hundred words could scarcely be less than several hundred dollars in any criminal trial. The court appears also to have been influenced, however, by its conclusion that Massachusetts need not have allowed criminal appeals at all, saying: "Having so provided for a corrective process, Massachusetts could certainly make reasonable requirements with respect to it." A more accurate evaluation of the significance of

Court has been alert to prevent the indigence of the defendant from prejudicing him before the courts. A series of cases, beginning with *Powell* v. *Alabama*, 287 U.S. 45, have made it clear that the States may not jeopardize the right of a defendant to a fair trial by denying him counsel simply because he cannot afford to retain counsel from his own funds. The rule is not absolute, but it is prejudice to the defendant which is the touchstone. That will not be permitted, and the circumstances in each case will be examined to determine whether the defendant was prejudiced by the failure of the State to make counsel available. *Betts* v. *Brady*, 316 U.S. 455.

The very nature of the rule with respect to counsel demonstrates the principle for which we contend. The indigent must not be prejudiced by his indigence. If the Court, after examining the proceedings, is satisfied that justice has been done—that the indigent defendant who cannot retain counsel has been accorded the same standard of justice as the defendant who retains his own counsel—the action of the State will not be dis-

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the origin of the right is that in Boykin v. Huff, 121 F. 2d 865, 872 (D.C. Cir. 1941), that "its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily."

In State v. Lorenzo, 235 Minn. 221, 50 N.W. 2d 270 (1951), an indigent defendant convicted of first degree murder petitioned for the appointment of counsel, the furnishing of a transcript, and the payment of other expenses on appeal. The court, in a brief per curiam opinion, stated: "The United States constitution does not require a state to provide the expenses of an appeal for an indigent defendant in a criminal case." The reliance by the court on cases which assert that a State need provide no appellate review whatever makes its conclusion equally doubtful under the Cochran and Dowd cases.

turbed. Indigence remains, as it should, "a neutral fact—constitutionally an irrelevance."

In contrast, here, the indigent *is* prejudiced. His lack of funds deprives him of a substantial right which the State accords to others with funds. Indigence is not neutral; it is the critical fact, the very basis upon which defendants such as these petitioners are prevented from securing the benefits of full appellate review of their conviction.

It may be urged, however, that notwithstanding our traditions, and despite the protestations of this Court, indigent defendants in criminal cases suffer a variety of handicaps, and that one more—the inability to exercise a statutory right to full appellate review—is no more than another instance of our inability to equate promise with performance. The cynic will assert that while this Court asserts that "all people must stand on an equality before the bar of justice in every American court" (*Chambers* v. *Florida*, 309 U.S. 227, 241), they do not in fact do so. The poor man may be unable to raise bail. He may have no realistic alternative to loss of liberty when sentenced to "ten dollars or ten days." Appointed counsel, or even counsel retained by defendants of modest means, may be less experienced, less skilled, than counsel for a defendant for whom the best, or at least the most expensive, are available. The poor defendant is handicapped in procuring evidence. The list, unhappily, can no doubt be multiplied.

To recognize shortcomings, however, is far from admitting that they should furnish the excuse for enlarging or perpetuating them. As we note in Point III, *infra*, the great majority of jurisdictions in the tradi-

tion of the common law have in whole or in part eliminated this particular discrimination as to the unavailability of appellate review. In this respect the indigent defendant *can* be made to "stand on an equality before the bar of justice." This Court should most certainly give no sanction to a patent discrimination against the indigent simply because it is powerless to eliminate all of his disadvantages.

For here we are dealing with the concrete, the tangible, almost the demonstrable fact that the quality of justice is made to differ depending on the defendant's financial circumstances. One standard, that of the trial court alone, is provided for the indigent. For those who are not indigent Illinois provides, in addition to this standard of the trial court, an appellate court which can give a more carefully weighed judgment, a judgment more divorced from sudden passions or prejudices, a dispassionate review. The very kind and quality of justice which the defendant receives depends upon whether or not he is indigent.

Moreover, the disadvantages of the impecunious defendant in the trial court—with regard to bail, or to the inadequacies in the presentation of his case, or to his sentence—are no doubt compensated for in considerable degree by the trial judge. At least, the opportunity for him to do so is always present. Here, even were it so disposed, the Illinois Supreme Court is powerless to mitigate in any way the discrimination in appellate rights. Without a transcript of the evidence or a bill of exceptions, no review of the proceeding in the trial court is possible; it is simply and finally non-existent.

Illinois itself recognizes that equal protection of con-

stitutional rights requires that a defendant be provided with a review of alleged constitutional violations in the proceedings which resulted in his conviction, and has made an adequate provision for supplying the necessary transcripts for indigent defendants. Ill. Rev. Stat. 1953, c. 37, sec. 163f (see Appendix A, p. 77). The equal protection of the laws, however, does not mean merely equal protection of those laws which concern the violation of constitutional rights. Rather, it requires equal protection of *all the laws*.

We submit, therefore, that the petitioners, whose rights to an appellate review of their conviction have been denied because of their indigence, while those same rights are granted by Illinois to persons who can afford to pay for a transcript and to defendants sentenced to death, have been denied the equal protection of the laws of Illinois guaranteed them by the Fourteenth Amendment to the Constitution.

B. ILLINOIS DISCRIMINATION AMONG INDIGENT DEFENDANTS BASED ON SEVERITY OF SENTENCE VIOLATES THE EQUAL PROTECTION CLAUSE.

The petition for certiorari likewise urges, as petitioners have done throughout the Illinois courts, that petitioners are denied equal protection of the laws in that even indigent defendants are supplied with a transcript of their trial for purposes of writ of error if they are sentenced to death, whereas indigents with lesser sentences, such as petitioners, are not. Ill. Rev. Stat. 1953, c. 38, sec. 769a (see Appendix A, p. 78). Although this discrimination may not be so unreasonable as the discrimination between the indigent and the non-

indigent discussed above, we believe it is another aspect of the fundamental unfairness accorded petitioners. See Point III, *infra*.

We recognize, of course, as the Court said at the last term in *Williams* v. *Georgia*, 349 U.S. 375, 391:

> "The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant."

The command of the due process clause in respect of the right to counsel is practically mandatory on the States in capital cases, whereas it is not more than a command of essential fairness in prosecutions for lesser offenses. *Patterson* v. *Alabama*, 294 U.S. 600; *Betts* v. *Brady*, 316 U.S. 455; *Bute* v. *Illinois*, 333 U.S. 640. But it does not suffice that the law recognizes that there is a difference between a capital and a non-capital case—and presumably in the same way between a death sentence and other sentences. The question here is whether the distinction is properly "relevant" when its application leaves one group of criminal defendants, otherwise identically situated, without a means of exercising their statutory right of appeal.

The right-to-counsel cases are illustrative. It is implicit in all those cases that all criminal defendants, whether rich or poor, whether indicted for capital or non-capital crimes, are equally entitled to a "due process" trial. And the inquiry in each case has been whether the hearing accorded the accused has been so lacking in adequacy because of the absence of counsel as to

"constitute a denial of fundamental fairness". *Betts v. Brady*, 316 U.S. 455, 462. In the present situation however, there is no question of ascertaining the adequacy of petitioners' appeal. For indigent defendants in non-capital cases get no transcript and thus have no appellate review of errors occuring at their trial.

Yet the Constitution makes no distinction in the protections which it affords to liberty, on the one hand, and life, on the other. They are equated in both the Fifth and the Fourteenth Amendments. As Mr. Justice Douglas said, dissenting, in *Bute v. Illinois*, 333 U.S. 640, 681, "Certainly due process shows no less solicitude for liberty than for life. A man facing a prison term may, indeed, have as much at stake as life itself."

Moreover, it should be pointed out that these provisions in the Illinois law give the trial judge in many cases an extraordinary degree of latitude in whether or not to permit an appeal from a conviction. The Court noted in *Carter v. Illinois*, 329 U.S. 173, 178, that the range of punishment which may be imposed for murder is between fourteen years and death. Only when the sentence is death does the indigent defendant become entitled to a transcript without cost. The right of appeal may be summarily denied by the trial court to an indigent so convicted by the imposition of any lesser sentence.

This is an arbitrary system. Any indigent defendant may, because of trial error, be the victim of injustice. Equal protection of the laws means that each should be equally able to utilize the avenue of appeal in order to insure fundamental fairness to all pauper defendants

III

ILLINOIS LAW DENIES TO PETITIONERS THE DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT

In Point II, *supra*, we have dealt with the discrimination to which petitioners are subject by the laws of Illinois in relation to the Equal Protection Clause of the Fourteenth Amendment. While petitioners' case can stand on that consideration alone, we need not stop there. Although we believe that the denial of a transcript to indigent prisoners in Illinois is a clearcut violation of the "more explicit safeguard of prohibited unfairness" embodied in the Equal Protection Clause, this Court has recognized that "the concepts of equal protection and due process, both stemming from our American idea of fairness, are not mutually exclusive". *Bolling* v. *Sharpe*, 347 U.S. 497, 499. Here, as in the school segregation cases, we submit that the discrimination against petitioners not only denies them equal protection of the laws, but is also "so unjustifiable as to be violative of due process." *Ibid.*

A. A SYSTEM OF CRIMINAL APPEALS HAVING BEEN ESTABLISHED, IT MUST CONFORM TO DUE PROCESS

We do not now urge that due process requires that a criminal defendant be afforded in every case the opportunity for an appellate review of his conviction. Historically, no such appellate review was available to any criminal defendant. Apparently because of this fact, the Court has said several times, as it did in *McKane* v.

Durston, 153 U.S. 684, 687, that such appellate review "was not at common law and is not now a necessary element of due process of law." "Due process," however, is not a static concept, and the rapid evolution of our concepts of criminal justice, which has led almost universally to the establishment of criminal appellate procedure, at least suggests that the issue is not foreclosed for all time.[10] But whatever may be the present—or the future—place of appellate review in our concept of due process, the question is not before the Court in the present case. Illinois *has* undertaken to establish a system of criminal appeals, and holds out writs of error in such cases as "writs of right" in "all criminal cases." Ill. Rev. Stat. 1953, c. 38, sec. 769.1 (see Appendix A, p. 78).

Although the Fourteenth Amendment may not have required Illinois to do this, once it has done so the consequences are no longer in doubt. As this Court has said, it is "perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law . . ." under which the prisoner is held, and such appellate procedures must therefore comply with the requirements of due process. *Frank* v. *Mangum*, 237 U.S. 309, 327. The *Frank* case was expressly followed in *Cole* v. *Arkansas*, 333 U.S. 196, 201, where the Court held that since an appeal was provided to the supreme court of

[10] There are already intimations in the State courts contrary to *McKane* v. *Durston*. See, e.g., Jones v. Commonwealth, 269 Ky. 779, 785, 108 S.W. 2d 816, 819 (1937); Life & Casualty Ins. Co. v. Womack, 228 Ala. 70, 71, 151 So. 880, 881 (1933).

ne State, "the proceedings in that court are a part of ne process of law under which the petitioners' convic- ons must stand or fall". See also *Bogkin* v. *Huff*, 121 . 2d 865, 872 (D.C. Cir. 1941); *United States* v. *Mills*, J F. Supp. 616, 618 (E.D. Pa. 1937).

In both *Frank* v. *Mangum* and the *Cole* case the de- endant had had the benefit of the appellate process, hile petitioners here have not. Nothing in those cases uggests, however, that a criminal defendant on whom he appellate process has operated, but operated un- airly, differs in his right to constitutional protection rom one who is unfairly denied the right to have it perate at all. Both cases make it clear that whatever ay be the command of the Fourteenth Amendment s to the necessity for appellate review in criminal ases, the Court will no longer accept the sweeping tatement in *McKane* v. *Durston* that "the right of ppeal may be accorded by the State to the accused pon such terms as in its wisdom may be deemed roper". See 153 U.S. at pp. 687-688.

It could not now seriously be urged, for example, that State could limit the right of appeal to those of the hite race, or to those under 50 years of age, or to those hose income exceeds $10,000 per year.[11] Just as in

[11] In Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150, in- olving the constitutionality of a statute which treated a railroad orporation differently in civil suits than other litigants, the Court aid (p. 155): "The State may not say that all white men shall e subjected to the payment of the attorney's fees of parties suc- essfully suing them and all black men may not. It may not say hat all men beyond a certain age shall be alone thus subjected, or ll men possessed of a certain wealth. These are distinctions hich do not furnish any proper basis for the attempted classifica-

many other fields of law, once a right is granted, unconstitutional conditions may not be imposed upon it. The political franchise of voting, for example, is "not regarded as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions", but when the right or privilege to vote is granted, the conditions which a State may place on it must be "reasonable and uniform". *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370, 371; *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875. And a State may not be required to establish a public school system, but once it does so, it must obey the command of equality in the Forteenth Amendment. *Brown* v. *Board of Education*, 347 U.S. 483.

The issue is squarely presented, therefore, whether a State system of criminal appeals, which purports to accord to every criminal defendant an appellate review of the proceedings in the trial court which resulted in the conviction, may withhold that appellate review from an indigent defendant who cannot pay for a transcript —unless he is sentenced to death. We submit that such an appellate system does not accord indigent defendants, such as petitioners here, the due process of law guaranteed by the Fourteenth Amendment.

There are, it is true, only a limited number of decisions by this Court which define the limits of due process as applied to appellate procedure. None of

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tion. That must always rest upon some difference which bears a reasonable and just relation to the act with respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

them has dealt with the issue now presented. The Court has said that due process on appeal does not require that a prisoner have a right to argue his own appeal or be present at the appellate hearing. *Price* v. *Johnston*, 334 U. S. 266, 285. A State need not provide an opportunity to a defendant to furnish bail pending appeal, *McKane* v. *Durston*, 153 U. S. 684, and it may dismiss a pending appeal when the prisoner escapes jail and becomes a fugitive. *Allen* v. *Georgia*, 166 U. S. 138. The State may establish a time limit for an appeal and refuse an appeal made one day late, since "A period of limitation accords with our conception of proper procedure." *Brown* v. *Allen*, 344 U. S. 443, 486.

The most relevant of these cases is *Price* v. *Johnston*. There the Court announced that while oral argument may not be necessary for a due process appeal, when oral argument is permitted "fairness and orderly appellate procedure demand that both parties be accorded an equal opportunity to participate in the argument either through counsel or in person". 334 U. S. at p. 280. Equality of appellate rights is recognized as an essential ingredient of fairness. There is nothing unequal, or unfair, when the State imposes a time limit within which an appeal must be taken, or when it denies to everyone the opportunity to present an oral argument. On the other hand, it is of the essence of inequality to permit an appellate review to those with funds and to deny it to those who are without. Constitutionally, as Mr. Justice Jackson has said (see pp. 29-30, *supra*) indigence should be "an irrelevance, like race, creed or color". "Due process should condemn an arbitrary withholding of the right of appeal when it is

permitted to others whose situation differs only in a respect which cannot be constitutionally recognized. *Cf. Cochran* v. *Kansas*, 316 U. S. 255; *Dowd* v. *Cook*, 340 U. S. 206; *Boykin* v. *Huff*, 121 F. 2d 865, 872 (D. C. Cir. 1941); *State* v. *Guerringer*, 265 Mo. 408, 416, 178 S. W. 65, 67 (1915). A system of criminal appeals which so grossly discriminates between indigents and non-indigents cannot meet the test of fundamental fairness.

There is likewise significance in the statement of the Court in *Foster* v. *Illinois*, 332 U. S. 134, 137, that, however wide may be the discretion of a State over the specific form of its criminal procedure, "process of law in order to be 'due' does require that a State give a defendant ample opportunity to meet an accusation". Illinois here purports to do so for all criminal defendants, by according them both the opportunity for a trial of the issue before a trial judge, and a subsequent appellate review of the conduct of the trial. For indigent defendants, however, except those sentenced to death, a significant portion of that statutory right is "a sham or a pretense". *Palko* v. *Connecticut*, 302 U. S. 319, 327. Indigent defendants such as petitioners may raise only the limited question open on the mandatory record; basic issues which may be raised by the proceedings at their trial, and which Illinois statutes recognize as appropriate for all defendants to raise in fully meeting the accusation against them, are beyond their effective recourse. For the indigent, opportunity to raise those issues is a mirage—"like a munificent bequest in a pauper's will". *Edwards* v. *California*, 314 U. S. 160, 186.

B. IT HAS BECOME FUNDAMENTAL THAT POOR DEFENDANTS SHOULD NOT BE DEPRIVED OF AN APPEAL BECAUSE OF POVERTY.

An issue such as this, however, need not be resolved solely on the earlier decisions of this Court. While those decisions lend no sanction to the discrimination which is present here, it may be said that they do not provide an automatic demonstration of its unconstitutionality. But there is another approach by which due process may be tested. Is the discrimination imposed on those petitioners at odds with "our American ideal of fairness"? *Bolling* v. *Sharpe*, 347 U. S. 497, 499. Does it comport with our "conception of fundamental justice"? *Foster* v. *Illinois*, 332 U. S. 134, 136. Is equality of scope of review on a criminal appeal for both indigent and non-indigent "implied in the concept of ordered liberty"? *Palko* v. *Connecticut*, 302 U. S. 319, 325. Does its absence "constitute a denial of fundamental fairness, shocking to the universal sense of justice"? *Betts* v. *Brady*, 316 U. S. 455, 462.

What constitutes such "fundamental fairness" is a matter to be ascertained from time to time by this Court. In deciding whether petitioners' constitutional claim made in this case should be sustained, the Court may well find relevant some of the historical factors involved in criminal appeals and *forma pauperis* proceedings which we discuss below.

But "since 'law' is not a static concept, but expands and develops as new problems arise" as the Court said in extending the scope of habeas corpus beyond the limited field it occupied in 1789, history will not be decisive. *Price* v. *Johnston*, 334 U. S. 266, 282; *Hurtado* v. *California*, 110 U. S. 516, 531. The same approach is

evident in the statement in *District of Columbia v. Clawans*, 300 U. S. 617, 627-628.

> "We are aware that those standards of action and of policy which find expression in the common and statute law may vary from generation to generation. * * * Doubts must be resolved not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments."

What should be decisive here is the same consideration which was determinative in the school segregation cases. "In approaching this problem", the Court there said, "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written." *Brown v. Board of Education*, 347 U. S. 483, 492. Just as the Court considered public education "in the light of its full development and its present place in American life", *ibid.*, so the Court should now examine the problem of criminal appeals *in forma pauperis*, and specifically the indigent prisoners practical need for a transcript, in this era of official stenographic court reporting.

The present practice of the great majority of the States, of the Federal courts, and of the balance of the English speaking world, which have eliminated or avoided the discrimination to which petitioners are subject, cannot be fully understood without an understanding of the evolutionary process which has occurred in criminal procedure. From early beginning

which are today so abhorrent to our sense of justice as to be almost incredible, modern standards have evolved, particularly in the past century. Appellate procedures, at first unknown, have become substantially universal. As a part of that same development, *forma pauperis* procedures have developed to make this new appellate right meaningful to all, not to just a privileged few, defendants.

The idea of equality before the law for rich and poor alike is one of the oldest and most fundamental aims of our legal system. Reginald H. Smith, *Justice and the Poor* (1919), p. 3. Magna Carta itself declared that "To no one will we sell, to no one will we refuse or delay, right or justice."[12] That the poor shall have their writs for nothing was an accepted maxim in the age of Bracton. See Pollock and Maitland, *History of English Law* (2d Ed. 1909), p. 195. In 1495 the statute of 23 Hen. VII, c. 12 established the right of "every poor person" to sue without payment of fees, with free subpoenas, and with assignment of counsel.

In criminal cases the early possibility of discrimination between rich and poor centered on the right to the aid of counsel. So far as paupers were concerned, the rules of Magna Carta were given dubious fulfilment by denying counsel to all defendants, rich and poor alike. No prisoner was permitted to be represented by counsel on the general issue of not guilty.

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[12] Magna Carta (1215), cap. 40. See Thompson, Magna Carta (1948), pp. 365, 380; McKechnie, Magna Carta (1914), pp. 127; 395-398; 2 Co. Inst., pp. 55-57.

Radin, *Anglo-American Legal History* (1936), p. 229.[13] Although counsel could represent defendants in misdemeanor cases, which were often called trespasses and considered closer to civil proceedings, not until 1836 did an English statute accord to a felony defendant the right to defense by counsel. 7 Will. III, c. 3, sec. 1. Certainly this seems to us "outrageous" and "obviously a perversion of all sense of proportion". *Powell* v. *Alabama*, 287 U.S. 45, 60. Indeed, even in the 18th Century Blackstone assailed this situation as "not at all of a piece with the rest of the humane treatment of prisoners by the English law". Blackstone, *Commentaries*, IV, p. *355.[14]

This same sort of negative parity between indigent and non-indigent criminal defendants characterized early appellate procedures. Blackstone's remark that "the criminal law is in every country of Europe more rude and imperfect than the civil" (IV, p. *3) is nowhere better demonstrated than in the matter of appellate review. In civil suits, bills of exception to rulings of the judge for use in writs of error were granted as of right in 1285 (Statute of Westminster II (13 Edw. I, c. 31)) but in criminal cases more than five centuries were to elapse before a like procedure

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[13] Coke explained that the court was counsel for the defendant, and that since proof in criminal cases must be "clearer than light" the court would not convict unless overwhelmingly satisfied. 3 Co. Inst. c. 3, sec. 1.

[14] On Blackstone's compatative basis, his conclusion may be questioned; the "humane treatment" of prisoners in his day would certainly not now be so regarded. See Radzinowicz, A History of English Criminal Law and Its Administration from 1750. The Movement for Reform, 1750-1833 (1948).

became available. In time, writs of error were permitted as *ex debitis justitiae* in misdemeanor cases on probable cause shown, but in capital cases they were considered *ex gratia* and not issued without express warrant from the king, and then only rarely.[15] Even when these writs became more readily available, in the 19th Century, there were no bills of exceptions by which to bring trial errors up for review, and the resulting review on merely the common law record—substantially no more than the indictment, plea and sentence—was so limited (as it is now on the mandatory record in Illinois) that the writs continued to be rarely used. See Stephen, *History of Criminal Law of England* (1883), Vol. I, c. 10. The absence of an adequate system of criminal appeals was recognized by English jurists as one of the laws greatest defects. Though they complained that the "evil is notorious", it was not until 1907, after a century of efforts at reform, that an adequate system of appeals was provided. Criminal Appeal Act 1907, 7 Edw. VII, c. 23. See Stephen, *supra*, Vol. I, pp. 309-313; O'Halloran, *History of English Criminal Appeals* (1949), 27 Can. Bar. Rev. 153; Orfield, *Criminal Appeals in America* (Jud. Adm. Ser. 1939), pp. 22-28.

In America, even from the earliest days, almost all of the States were ahead of England in giving effect to those reforms in criminal procedure which are now generally regarded as fundamental. Even in 1789 most of the colonies had rejected the rule that denied coun-

[15] 2 Bl. Comm. *392. Blackstone adds "but they may be brought by his heir, or executor, after his death, in more favorable times; which may be some consolation to his family".

sel to one accused of felony. See *Powell* v. *Alabama*, 287 U.S. 45, 61; *Betts* v. *Brady*, 316 U.S. 455, 465, 467. At that time, however, recognition of a right to counsel did not necessarily imply a recognition of the right of an indigent prisoner to have counsel appointed for him. The State constitutions "were not aimed to compel the State to provide counsel for a defendant", and those States which did have statutes providing for counsel for indigent prisoners reflected very different policies. *Betts* v. *Brady*, 316 U.S. at pp. 466, 467.

The granting of the right to counsel, in other words, at first created for indigent prisoners a new inequality as contrasted with those who could afford to employ counsel. Fortunately, our fundamental concepts of justice are not measured by the inequities of 1789, and this inequality has consequently been eliminated. In the Federal courts, the Sixth Amendment guarantee of the right to counsel in "all criminal cases" was not considered as embodying the right of an indigent to appointed counsel. When Congress in 1790 required Federal courts to assign counsel to indigents in capital cases (1 Stat. 118; U. S. C., Tit. 18, sec. 3005), this was seen as an addition to the Sixth Amendment guarantee. See Perkins, *Cases on Criminal Law and Procedure* (1952), pp. 767-770 and Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U.L. Q. Rev. 1, 7-8, 10 (1944), quoted in *Bute* v. *Illinois*, 333 U. S. at 661, n. 17. Yet in *Johnson* v. *Zerbst*, 304 U. S. 458, this Court construed the Sixth Amendment to require the appointment of counsel in all cases where a defendant is unable to procure the services of an attorney, and where the right has not been intentionally

and competently waived. The procedure now required by "the humane policy of the modern criminal law" that an indigent defendant may have counsel furnished him by the state was said by the Court to be consistent with "the wise policy of * * * our fundamental charter." *Id.* at p. 463.

In the State courts, the same early discrimination against the pauper arising from the availability of counsel for the defendant in felony cases has likewise been eliminated. *Powell* v. *Alabama*, 287 U.S. 45, held that the right to the aid of counsel is of such "fundamental character" as to be incorporated in the due process clause of the Fourteenth Amendment. Later decisions have left no doubt that fundamental fairness and justice require that counsel be supplied to those who cannot afford them in any capital case where without counsel the accused is incapable of making an adequate defense, and in noncapital cases wherever the accused can show that "for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement." *Foster* v. *Illinois*, 332 U.S. 134, 137.

The story of criminal appellate review in this country also demonstrates our unwillingness to permit the indigent to suffer discrimination because of his inability to pay the costs of the new appellate procedures.

By the Judiciary Act of 1789 (1 Stat. 84, c. 20, sec. 22) Congress empowered this Court to issue writs of error in civil suits, which was construed to mean that the court had no such appellate power over criminal cases. *United States* v. *Sanges*, 144 U.S. 310, 319-322. No review of a criminal case was provided until 1879

(20 Stat. 354, c. 176) when writs of error were authorized to be issued by the Circuit Courts at their discretion, and it was not until 1891 that criminal review of serious crimes was allowed as of right.[16]

In this respect the States were ahead of the Federal government, at least in allowing writs of error in criminal cases, although Georgia had no appellate courts of any kind until 1846.[17] However, as in England, writs of error were of little use without bills of exception. Provision for such bills was made by statute, or appeals were provided on the facts as well as the law, but in 1919 such statutes could be said to be "of comparatively recent adoption." *Buessel v. United States*, 258 Fed. 811, 815 (2d Cir. 1919).[18]

Illinois, it should be said, was in the front ranks in this respect. As early as 1827 writs of error in non-capital cases were "considered as writs of right and issue of course," while in capital cases such writs might

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[16] Act of March 3, 1891, 26 Stat. 826, c. 517; Act of Feb. 6, 1889, 25 Stat. 655, c. 113, sec. 6. See Bristol v. United States, 129 Fed. 87, 88 (7th Cir. 1904), Buessel v. United States, 258 Fed. 811, 815 (2d Cir. 1919), and United States v. Sanges, *supra*.

[17] See Orfield, *op. cit. supra*, at p. 33; Lamar, A Unique and Unfamiliar Chapter in Our American Legal History, 10 A.B.A. Jour. 513 (1924).

[18] In Pennsylvania, for example, not until 1856 was review of felonious homicide cases granted as of right, and not in all criminal cases as of right until 1897; bills of exceptions were not provided in felonious homicide cases until 1856, and not until 1874 in other criminal cases. See Commonwealth v. Ashe, 167 Pa. Super. 323, 325-327, 74 A. 2d 656, 659 (1950); von Moschzisker, Trial by Jury (2d Ed. 1930) Secs. 222-224. In Wisconsin, no law authorized bills of exception in criminal cases until 1869. See State v. Clifford, 58 Wis. 113, 115, 16 N.W. 25, 27 (1883).

be granted if the judge saw reasonable cause. Ill. Rev. L. 1827, secs. 186, 187, p. 166.[19] And at the same time bills of exceptions in the trial of any crime or misdemeanor were provided. Ill. Rev. L. 1827, sec. 185, p. 165; Ill. Rev. Stat. 1845, sec. 197, p. 188.[20]

Today, of course, criminal appellate procedures are provided not only in England and members of the Commonwealth, and in the Federal courts, but in every State. As these systems of appeal developed in the 19th Century, protection of the new appellate rights for indigent defendants tended to lag behind, as had earlier been the case with respect to the right to counsel. A new inequality, comparable to the inequality relating to counsel in the trial court, was the result.

This new discrimination was so widely recognized that there were serious suggestions that all criminal

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[19] In 1953 an amendment to Ill. Rev. Stat., c. 38, sec. 769, remedying this "curious anomaly" made writs of error as of right in "all criminal cases". This ancient distinction which gave greater protection to those convicted of the less serious crimes is a carry-over from the days when there was no criminal appeal from a felony conviction, and now seems to us as much a "perversion of all sense of proportion" (Powell v. Alabama, 287 U.S. 45, 60) as the denial of counsel to felony prisoners while granting counsel to defendants in misdemeanor cases, p. 46, *supra*. In righting this obvious distortion, it does not seem reasonable to stand the old system on its head and to deny, as Illinois now does, adequate appellate protection to all indigents but those sentenced to death. See pp. 34-36, *supra*.

[20] Illinois procedure developed from that of the Northwest Territory. The General Court of the Territory entertained bills of exceptions from the circuit court in 1807 in civil suits, and in criminal trials there were motions for new trials from the nisi prius court to the court en banc. Philbrick, The Laws of Illinois Territory, 1809-1818 (Ill. Hist. Coll., 1950) pp. xxi-xlix.

appeals should be eliminated. The poor man, concluded Orfield [2]:

> "may be unfairly tried for the very reason that he cannot afford to appeal. The man of means can take his appeals even though he has but the flimsiest grounds. The contrast in the position of the two has led a number of authorities to favor the abolition of all criminal appeals. That everyone should be put on a basis of equality is the theory."

But as the right to an appellate review of a conviction came to be "regarded as essential" (Orfield, *op. cit. supra*, at p. 32) the discrimination was eliminated not by a regressive step, but by providing adequate relief for indigent defendants.

1. The Federal Practice

Congress had early provided relief for poor persons in criminal proceedings. The Act of August 8, 1846, (9 Stat. 72, c. 98, sec. 11) authorized the Federal courts to issue subpoenas for an indigent defendant's witnesses, who were to be paid by the Government. Appellate procedures in criminal cases in the Federal courts, however, as already noted, were long delayed. Not until 1904 was the issue presented to this Court whether the act of 1846 was an exclusive definition of the Government's liability to aid an indigent criminal defendant or whether such aid should include assistance in making it possible for an indigent to avail himself of an appellate review of his conviction. In that year, in *United States* v. *Gilbert*, 198 U.S. 528, the Court held

[2] Orfield, *op. cit. supra*, at p. 174.

that a Federal court could, and should, order the government to pay for a complete transcript for a defendant's appeal from a criminal conviction (193 U.S. at p. 530):

> "The indigent defendant ought not to be deprived of availing himself of his writ of error because of his poverty. * * *."

Unfortunately, this did not dispose of the question. In civil suits, Congress in 1892 had by statute relieved from fees or costs paupers "entitled to commence any suit or action in any court of the United States." Act of July 20, 1892, 27 Stat. 252, c. 209 (see Appendix A, pp. 71-72). See *Bristol* v. *United States*, 129 Fed. 87, 88 (7th Cir. 1904). When the issue arose in a civil case, the Court held that this statute did not apply to fees or costs in an appellate court on writ of error. *Bradford* v. *Southern Ry. Co.*, 195 U.S. 243. There are, of course, cogent considerations of policy which distinguish *in forma pauperis* relief in civil cases from similar relief in criminal cases, where a defendant's life or liberty is at stake. See *Boykin* v. *Huff*, 121 F. 2d 865, 872 (D. C. Cir. 1941). In the *Bradford* case itself there was no reference to the recent unanimous decision in the *Gildersleeve* case; rather, the Court was concerned solely with civil litigation. It quoted (195 U.S. at p. 249) the following from *Moore* v. *Cooley*, 2 Hilt. 412 (N.Y. Spec. T. 1845):

> "There can be little doubt that the [forma pauperis] statute under which this motion is made, should be construed strictly; for the pauper comes to litigate entirely at the expense of others. He is neither able to pay his own attor-

neys or counsel, nor is he liable to his adversary should the suit prove to be groundless. He thus enjoys a great privilege and exemption from the common lot of men, whereby, in respect to causes of action proper, he becomes, as Lord Bacon says, rather able to vex than liable to sue. (Hist. of Hen. 7)."

The result in the *Bradford* case was shortly changed by statute so that the benefits of the 1892 act were extended to appellate proceedings. At the same time Congress also made the act applicable to criminal as well as civil cases. Act of June 25, 1910, 36 Stat. 866, c. 435 (see Appendix A, pp. 72-74). Nonetheless, even the amended law was held by a number of lower Federal courts inadequate to enable an indigent criminal defendant to obtain a transcript without cost for purposes of an appeal or writ of error. In what came to be the leading case, *United States* v. *Fair*, 235 Fed. 1015 (N.D. Calif. 1916), the defendant moved the court for an order directing the reporter to transcribe the testimony at Government expense in order that he might present his bill of exceptions. The order was denied, the court holding that Section 5 of the 1892 statute made this impossible because of the proviso in that section stating that the United States is not liable for costs incurred by a judgment for costs,[28] and that since the re-

[28] Section 5 stated (27 Stat. 252): "That judgment may be rendered for costs at the conclusion of the suit as in other cases: *Provided*, That the United States shall not be liable for any of the costs thus incurred." (See Appendix A, p. 72).

porter was not an officer of the court, he could not be required to transcribe his notes without compensation.

The decision in the *Fair* case appears to have misapprehended the statute, as well as to have ignored the inherent powers of the court as stated in the *Gilbert* case.[23] Nonetheless, it was cited and followed in a number of cases,[24] and whatever its correctness may have been, it appears to have been the Federal rule

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[23] Section 5 of the 1892 Act and particularly its proviso that the United States "shall not be liable for any of the costs", appears to have been misconstrued. The section itself was apparently written into the act simply to take care of the situation in which a pauper in a civil suit might later come into funds; there was no reason why a defendant should be denied a judgment for costs, when otherwise entitled, simply because the plaintiff was a pauper when the suit was brought. The proviso, however, was no more than an almost unnecessary caution that the section should not be construed to mean that the United States would pay the costs if the pauper were unable to do so. See 23 Cong. Rec. 5199 (1892). It does *not* state, as the court in the Fair case said (235 Fed. at 1016): "that Congress did not intend that the United States should be liable for any of the costs incurred under the provisions of the act".

Prior to the 1910 amendment extending the 1892 act to criminal cases the Attorney General could, and did, authorize the printing of a record at Government expense on a pauper's appeal in a criminal action. 26 Comp. Dec. 362, 363 (1919). For the court in the Fair case to hold that Congress, which plainly in 1910 was trying to extend aid to indigent criminal defendants, had in fact curtailed the court's power to aid them, appears to have been an unfortunate but flagrant statutory construction.

[24] United States *ex rel.* Estabrook v. Otis, 18 F. 2d 689 (8th Cir. 1927); United States *ex rel.* McNeil v. Airs, 108 F. 2d 437 (3d Cir. 1939); Estabrook v. King, 119 F. 2d 607 (8th Cir. 1941); 9 Comp. Gen. Dec. 503 (1930). Cf. Middleton v. Hartford Acc. & Indemnity Co., 119 F. 2d 721, 724 (5th Cir. 1941); Cheek v. Thompson, 33 F. Supp. 197, 499 (W. D. La. 1940), *aff'd per curiam*, 140 F. 2d 186 (5th Cir. 1944).

until 1944.[25] In 1944, however, Congress, responding to appeals from practically every segment of the bench and bar,[26] established the present system of official court reporters, and at the same time provided that the services of those reporters in preparing transcripts for indigent defendants should be free; the only qualification is that no appeal *in forma pauperis*, civil or criminal, may be taken "if the trial court certifies in writing that it is not taken in good faith." Act of January 20, 1944, 58 Stat. 5, c. 3; U.S.C., Title 28, secs. 753(f), 1915(a) (see Appendix A, pp. 74-76).

The urgently felt necessity for the elimination of the discrimination between the indigent and the non-indigent in Federal criminal appeals is emphasized by the statement of the supporters of this legislation before the Congress. The Attorney General, Francis Biddle, wrote (H. Rep. No. 868, 78th Cong., 1st Sess. (1943) pp. 4-5):

> "The condition [of hiring private reporters] is even more deplorable in criminal cases, owing to the fact that most defendants are financially unable to hire a reporter. The result is that many criminal cases in the Federal courts are not reported at all, unless the prosecution has

[25] Indigent defendants might, it is true, in probably a limited number of situations, secure a narrative or summary record adequate to reach the Court of Appeals through their appointed counsel, with no cost to either the United States or the defendant. Miller v. United States, 317 U.S. 192. Even that limited possibility, as we have shown above pp. 15-18, is not open in Illinois.

[26] See, e.g., Judge John J. Parker, The Integration of the Federal Judiciary, 56 Harv. L. Rev. 563, 573 (1943); H. Rep. No. 868, 78th Cong., 1st Sess. (1943) p. 4.

some particular reason for causing them to be reported. If the defendant desires to appeal from a conviction in such an instance, he is practically precluded from securing review of the question whether the evidence warranted the verdict of guilty, which frequently is the most important point the defendant desires to raise. Even in those instances in which a criminal trial is reported, the defendant frequently is unable to pay the cost of the transcript. While the statute which permits an appeal to be prosecuted in forma pauperis exempts an appellant so proceeding from the payment of clerk's fees, it makes no provision for securing for him a copy of the stenographic transcript of the trial."

Chief Judge Groner is likewise quoted as follows (*id.*, p. 2):

"... it is a scandal that cases involving long terms of imprisonment and even cases involving the death punishment are brought without an adequate record because no record is accessible to the accused, the appellant. I do not think there can be any question of doubt of the desirability of a law of this nature."

The Committee itself concluded (*id.*, p. 1):

"In many cases an impecunious litigant, whether in a civil or criminal proceeding, is unable to bear such a financial burden [of hiring outside reporters] and he is therefore unable to

protect his rights fully. The charge is frequently made that Federal courts are rich men's courts."

The present Federal view is probably well expressed in *Boykin* v. *Huff*, 121 F. 2d 865, 872 (D.C. Cir. 1941), where the court said that it had no doubt that Congress had "wide latitude for determining how far the Government may be required to bear the costs of civil litigation", and assumed that there is "room for some discretion concerning the costs of defense in criminal matters" and then added:

> "But when the life or the liberty of the citizen is at stake on a serious criminal charge, and appeals are given as a matter of right to those who are able to pay for them, it may be doubted (though as to this we express no opinion) whether they can be withheld from indigent persons solely on the ground of their poverty or otherwise than so as to give them substantially equal protection with more fortunate citizens."

2. The State Practice

In Illinois, however, indigent criminal defendants have had quite a different history. Its Constitution, to be sure, has long embodied the promise of Magna Carta (p. 45, *supra*). Article VIII, sec. 12 of the Constitution of 1818 reads:

> "Every poor person within this state ought to find a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged to

purchase it, completely and without denial, promptly and without delay, conformably to the laws.'"

But, like the English *forma pauperis* provision of 1495, *supra*, p. 45, the Illinois statute to aid "every poor person" was limited to poor persons in civil suits. See Ill. Rev. Stat. 1953, c. 33, sec. 5; Ill. Rev. Stat. 1874, p. 297, sec. 5; Ill. Rev. Stat. 1845, p. 126, sec. 3.

It was not until 1927 that any statute provided *forma pauperis* assistance to criminal defendants for necessary expenses on appeals, and then it was limited to those in capital cases sentenced to death. Ill. Laws 1927, p. 398, sec. 4; Ill. Rev. Stat. 1953, c. 38, sec. 769a (see Appendix A, p. 78). Under this Act the counties were required to pay "all necessary costs and expenses" incident to a writ of error by such defendants, "including all court costs, stenographic services and printing". See also Ill. Laws 1929, p. 306; Ill. Rev. Stat. 1953, c. 34, sec. 163b.

This Act of 1927 coincided with the legislature's extension, in the same month, of the official shorthand court reporting system to superior and city courts, as well as to circuit courts. Ill. Laws 1927, p. 395. In 1887 judges of the circuit courts for the first time had been empowered to appoint shorthand reporters to take verbatim accounts of all trials. Ill. Laws 1887, p. 159. Illinois provisions for court reporters are now found in Ill. Rev. Stat. 1953, c. 37, sec. 163 (see Appendix A, pp. 76-78).

With the introduction of this modern system of verbatim court reporting, a copy of the stenographic

transcript became a necessary expense of an appeal.[27] Thus the modern system at first accentuated the discrimination between the indigent and the more fortunate. But it has also facilitated the solution. In the Federal courts, for instance, unofficial court reporters had been available for many years before official court reporting was established in 1944, but they functioned only when employed by the parties. Unless the prosecution itself employed a reporter, a transcript could be made available to a defendant only if he were able to make arrangements in advance. For the court to provide a transcript for the indigent defendant a record would have to be made at every trial so that a transcript could later be prepared if the defendant were convicted and an appeal was sought. When official reporters make a stenographic record of every trial in any event, the extra burden of providing a transcript is simply the cost of having the notes typewritten. Such is the situation now in Illinois.

As we have seen, the present system of providing free transcripts to indigent defendants was established simultaneously with the introduction of modern court reporting in Federal courts. Most of the States, as we see below, had already done this before Congress acted. Illinois, however, has lagged behind by not giving this

[27] In 1943 Judge John J. Parker said of such stenographic reporting that "under modern methods of administering justice, it is a practical necessity if there is to be an appeal or other review of the proceedings." Parker, The Integration of the Federal Judiciary, 56 Harv. L. Rev. 563, 573 (1943). See also Orfield, Criminal Procedure from Arrest to Appeal (Jud. Adm. Ser. 1947), p. 489.

how essential assistance to indigents who are not sentenced to death.[28]

With or without official court reporting, however, the discrimination to which petitioners are subjected in Illinois is *not* permitted in the vast majority of jurisdictions in the English speaking world. Fundamental fairness, a sense of what justice requires, a feeling as to what process is "due", have led all but a small minority of jurisdictions to guarantee that an indigent defendant shall not be prejudiced by his inability to afford a full and adequate appeal from his conviction which may be available to the defendant who is not indigent. As long ago as 1913 the Criminal Court of Appeals of Oklahoma aptly expressed the necessity of such a rule (*Jeffries v. State*, 9 Okla. Cr. 573, 576, 132 Pac. 823, 824, (1913)):

> "It is true that appellant is only a friendless negro without money, and dependent upon the charity of his attorneys for his defense. But the law is no respecter of persons. It cannot look to the color of a man's face, the size of his pocketbook, or the number of his friends. We want the people of Oklahoma to understand, one and all, that the poorest and most unpopular person

[28] Perhaps one reason Illinois has lagged in this respect is that it was slow in establishing its official reporting system. In 1909 when a report of the American Bar Association urged such a system as "indispensable" for the federal courts and the few state jurisdictions still without it, Illinois and two others were said to be the only states without adequate provisions. 34 Rep. A.B.A. 578 (1909). See also Pound, Appellate Procedure in Civil Cases (Jud. Adm. Ser. 1941), p. 360.

> in the state, be he white or black, can depend upon it that justice is not for sale in Oklahoma, and that no one can be deprived of his right of appeal simply because he is unable to pay a stenographer to extend the notes of the testimony."

And in *State v. Guerringer*, 265 Mo. 408, 416, 178 S.W. 65, 67 (1915), the Supreme Court of Missouri wrote:

> "If he had no opportunity to file a motion for a new trial, as we must concede he did not have, but notwithstanding this his life be taken, it will have been taken without due process of law; for, while the right of appeal is not essential to due process of law (Reetz v. Michigan, 188 U.S. loc. cit. 508, 23 Sup. Ct. 390, 47 L. Ed. 563), yet, if an appeal be allowed to some persons, and not to all persons similarly situated, such deprivation of the right to an appeal is equivalent to the denial of due process of law, for due process of law and the equal protection of the laws are secured only if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' (Duncan v. Missouri, 152 U.S. loc. cit. 382, 14 Sup. Ct. 572, 38 L. Ed. 485)."

We have included, as Appendix C to this brief, a list of the various jurisdictions, and a reference to the relevant statutory or judicial citation in which the policy of the States is set forth. These references supply the answer to the question whether the discrim-

mation imposed on these petitioners is consistent with "our American ideal of fairness", or our "conception of fundamental justice", or whether its absence does in fact "constitute a denial of fundamental justice". See p. 43, *supra*. Moreover, they supply the answer in the manner in which the Court has indicated that it should be resolved—not subjectively, but "by 'objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments". *District of Columbia v. Clawans*, 300 U.S. 617, 628.

For the "laws and practices of the community"—the Federal government and the several States, as well as the remainder of the English-speaking world from which our traditions have been derived and in which they continue to evolve—cannot be doubted. In addition to the Federal government, there are 29 States which provide a free transcript to a defendant desiring to appeal upon proof only of his indigence. There are seven more which provide a free transcript to all indigent defendants in the discretion of the trial court—systems comparable to that of the Federal courts already noted at p. 56, *supra*. In addition, six States provide a free transcript in case of serious crimes, but only two of these, Maryland and New Jersey, restrict the right, as does Illinois, to cases in which the death sentence has been imposed. Five States make no provision for a transcript, but in three of these State practice makes a full appeal available to indigent defendants upon such documents as a narrative bill of exceptions, a stipulated statement of facts, or a bystanders' bill. In England the practice of providing

a transcript at State expense is clearly established, and this practice is followed by most of the British Commonwealth.

The provisions by which the States have prevented the discrimination to which these petitioners are now subjected are not, to be sure, entirely uniform. Appendix C spells out the details. Yet we submit that there could be no better demonstration of the almost universal sense that it *is* unfair, unjust, and inconsistent with our traditions that a poor man should be denied the same quality of justice, the same opportunity to defend against the threatened loss of his liberty, as is afforded those with money. A statute which established in so many words an appellate system for wealthy criminal defendants, and no one else, would be an affront to every concept of ordered liberty which we cherish and in which we take pride. A system of criminal appeals which in necessary effect accomplishes precisely the same result cannot escape the same condemnation.

In 1910, John D. Lindsay urged upon the New York State Bar Association legislation which would permit the indigent full access to the criminal appeals system and said (33 Rep. N.Y. State Bar Ass'n 34, 37):

> "I am not speaking of crimes of any particular class, but of a system which denies to the poor man the appeal which the law says he may take as a matter of right. Think of the irony of a statutory enactment which confers a right of which only the man of substantial means may avail himself."

In the next year New York extended the right to free transcripts to paupers sentenced to a punishment other

than death—paupers sentenced to death previously had been provided a free transcript in New York.

Nor, again, are these various provisions of ancient age. Some, as in the Federal courts, are even recent, but in many of the States this protection to the indigent defendant has been long established. The Iowa statute was passed in 1872, that of Ohio in 1873, of Indiana in 1893, of Arkansas in 1897, and that of New York, as above noted, in 1911. We have not sought to trace the rule in each State back to its origin; there may be others of even earlier dates. The important fact, however, is not the age of those statutes, but that they are now almost universal. The possibility of this discrimination itself had to await the emergence of a system of criminal appeals in which a review on a bill of exceptions or its equivalent was possible, and, as we have already noted, pp. 50-51, that is itself a modern development. The answer to the question whether the discrimination prescribed here is a denial of fundamental fairness may not be answered by the observation that few if any States provided free transcripts in 1791, or in 1868. Just as in deciding the school segregation cases the Court cannot "turn the clock back"; discrimination against the poor in the availability of criminal appellate procedures must be tested against modern appellate criminal procedures and modern stenographic court reporting "in the light of its full development and its present place in American life". *Brown* v. *Board of Education*, 347 U.S. 483, 492.

As we have seen above, history alone would have denied to the indigent the other major protection in criminal cases which has been afforded him by the Due Process Clause—the right to have counsel assigned to

him whenever "for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement". *Foster* v. *Illinois*, 332 U.S. 134, 137. No more should history, here, or rather, the lack of it—serve to deny the indigent a substantial right which has been accorded by the State to the non-indigent.

Finally, although its relevance may be doubted, we should point out that neither the Federal government nor the States which have undertaken to provide the indigent defendant with a free transcript have a record of experience which would suggest that such a course is impractical or burdensome. There has been no flooding of the appellate courts, nor have the costs been exhorbitant. In jurisdictions where the courts have some discretion in the matter, as in the Federal system (see p. 56, *supra*), wholly frivolous appeals are of course no problem, nor is the expense to the Government of supplying transcripts in appeals of substance any burden whatever. There are no published figures, but the Administrative Office of the United States Courts has supplied us with rather precise estimates for the last three years, as follows:[29]

Year	Number Transcripts Furnished	Cost
1953	100	$24,000
1954	135	28,000
1955	120	25,000

[29] Exact figures are not available because the records of the Administrative Office do not distinguish between transcripts provided paupers for purposes of appeal and costs for other services, such as providing daily transcripts. The Administrative Office does feel, however, that these figures give a true indication of the volume and cost of transcripts provided for appeals.

Even more significant than this average yearly cost to the Federal Government of only about $25,000, is the experience of the States in which the element of discretion in the court is absent—in which the only showing which a defendant must make in order to have a transcript with which to appeal his conviction is proof of his indigence. We have written to the Clerks of the Supreme Courts of each of such States, and have lodged their letters in response with the Clerk of this Court.

Only one State, Utah, supplied data on the expense; in that State the total amount paid to court reporters for preparing transcripts for indigents during the year ending June 30, 1955, was $2,174.76. The Clerk there had heard no opinion expressed that the rule in that State had led to frivolous appeals, and similar opinions that the right was not abused came from Clerks in Florida, Nebraska and West Virginia, from an assistant attorney general in Wisconsin, and the Secretary of the Judicial Council in Kentucky. Several other States reported such a limited number of appeals by indigents that lack of abuse may be safely inferred. In Arkansas such appeals are about one in two hundred; in Kentucky they average 5 or 6 per year; in Missouri they average about 12 per year; in Montana they average about 8 per year, with a reversal in about 1 out of 10. In Nebraska there were six such appeals in 1952, with one reversal; five in 1953, with two reversals; and five in 1954, with one reversal. In South Carolina there are "very few" such cases, and in West Virginia the clerk says that there have been few, if any. On the other hand, in

Oklahoma, the Presiding Judge is "quite sure" that the right has been abused, and estimates that one-quarter of the appeals are by paupers, of which only about 10 percent have any merit.

Thus, we see not only that it has become fundamental that indigent petitioners should not be discriminated against as these petitioners are in Illinois, but that the protection petitioners are seeking is not an undue burden on the administration of justice. As the Illinois Law Review concluded, after examining the adequate provisions for *forma pauperis* criminal appeals in most other States, "surely the time has come for Illinois to join their ranks."[30] This Court is once again called to its "uncongenial duty" of testing a State criminal procedure "by what is to be found in the Due Process Clause of the Fourteenth Amendment". *Watts* v. *Indiana*, 338 U.S. 49, 50. We believe that such a test will show that an available method of appeal for indigents in a State where an appeal is granted to all as of right is one of those "safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective". *Id.* at 55.

IV. The Proper Remedy

We submit, therefore, that Illinois, which grants an appellate review of criminal convictions, has denied to

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[30] Comment, Post-Trial Remedies: The Illinois Merry-Go-Round Breaks Down, 46 Ill. L. Rev. 900, 914 (1952). See also A.L.I., Code of Criminal Procedure (1931) which provides not only an appeal as of right (sec. 426) but also for the automatic transcribing of the reporter's stenographic notes upon notice of appeal (sec. 445), and the transmittal of this transcript to the appellate court (sec. 447); and see the annotation to these sections, showing State practices in 1931.

these petitioners the equal protection of the laws and the due process of law to which the Fourteenth Amendment entitles them. There remains the question as to the proper remedy.

That question, we believe, is best answered by reference to *Dowd* v. *Cook*, 340 U.S. 206. Petitioners there, like petitioners here, were found to have been denied improperly an appeal to which they were constitutionally entitled. The order of the Court in that case simply directed the State to provide them with the same appeal to which all others were entitled, or in the alternative to discharge them from custody.

It should be added that the *Dowd* case makes it clear that Illinois may *not* now undertake to deny petitioners a full appellate review on any finding or determination by its courts that, as a matter of discretion, petitioners' appeal need not be accorded them because it would be frivolous or unneccessary for any other reason. Just such a remedy for a discriminatory denial of appellate rights was likewise attempted in *Dowd* v. *Cook*, and was specifically rejected as inadequate by this Court. See the quotation at p. 28, *supra*. We do not need to reach the issue whether a general rule which gives the courts a limited discretion to weed out frivolous appeals, such as now obtain in several States, is an adequate discharge of the States' responsibilities under the Fourteenth Amendment. All that we now assert is that no more in this case than in *Dowd* v. *Cook* may the State create such a rule for just these petitioners.

CONCLUSION

The decision below should be reversed, and the cause remanded to the court below, with instructions that petitioners are either to be accorded an appeal from their conviction, or discharged from custody.

Respectfully submitted.

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OCTOBER 1955.

APPENDIX A

FEDERAL

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Act of July 20, 1892, 27 Stat. 252, chapter 209:

> CHAP. 209.—An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to

commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

SEC. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury is in other cases.

SEC. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

SEC. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

SEC. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: *Provided,* That the United States shall not be liable for any of the costs thus incurred.

3. Act of June 25, 1910, 36 Stat. 866, chapter 435:

CHAP. 435.—An Act to amend section one, chapter two hundred and nine of the United

States Statutes at Large, volume twenty-seven, entitled "An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," and to provide for the prosecution of writs of error and appeals in forma pauperis, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of an Act entitled "An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," approved July twentieth, eighteen hundred and ninety-two, be, and the same is hereby, amended so as to read as follows:

"That any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action

or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal.

4. Title 28, Section 1915 (Act of June 25, 1948, chapter 646, 62 Stat. 954, as amended):

§ 1915. *Proceedings in forma pauperis*

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such

cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party the same shall be taxed in favor of the United States.

5. Title 28, Section 753(f), Act of June 25, 1948, chapter 646, 62 Stat. 922:

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial

judge or a circuit judge certifies that the appeal is not frivolous but presents a substantial question. The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

ILLINOIS

The relevant portions of the several sections of the Illinois Revised Statutes 1953 are as follows:

CHAPTER 37:

§ 163b. Duties—Compensation

The reporter shall take full stenographic notes of the evidence in trials before the court for which he is appointed, and shall furnish one transcript of them, if requested by either party to the suit, or by his attorney, or by the judge of the court, to the person requesting it. * * * The reporters may charge not to exceed twenty cents per one hundred words for making transcripts of their shorthand notes. The fees for making transcripts shall be paid in the first instance by the party in whose behalf such transcript is ordered and shall be taxed in the suit. The transcript shall be filed and remain with the papers of the case: When the judge trying the case shall, of his own motion, order a transcript of the shorthand notes, he may direct the payment of the charges therefor, and the taxation of the same, as costs in such matter as to him may seem just:

Provided, that the charges for making but one transcript shall be taxed as costs, the party first

ordering the transcript shall have the preference unless it shall be otherwise ordered by the court.

§ 163f. Transcription of shorthand notes in cases where convicted person claims violation of constitutional rights—Fees

In any case arising under "An Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed to them by the Constitution of the United States or the State of Illinois, or both, have been denied, or violated, in proceedings in which they were convicted," approved August 4, 1949, in which the presiding judge has determined that the post-conviction petition is sufficient to require an answer, it shall be the duty of the official court reporter to transcribe, in whole or in part, his stenographic notes of the evidence introduced at the trial in which the petitioner was convicted, if instructed so to do by the State's Attorney or by the court.

It shall further be the duty of the official court reporter at any trial, in any of the courts of this State conducted under the provisions of the Act hereinabove referred to, to transcribe his stenographic notes of the evidence introduced at such trial, when a petition for writ of error is filed.

The reporter shall be paid the same fees for making such transcripts of evidence as provided for in Section 2 of this Act for making transcripts in other cases, out of the State Treasury on the warrant of the Auditor of Public Accounts, out of any funds appropriated for that

purpose, upon presentation of a certificate signed by the presiding judge setting forth the amount due him.

CHAPTER 38:

§ 769.1 Right to writ—Supersedeas

Writs of error in all criminal cases are writs of right and shall be issued of course.

§ 769a. Costs to be paid by county when convicted person is poor

In any prosecution for a capital offense, where the sentence is death, the trial court, if satisfied that the person convicted is a poor person and unable to prosecute his writ of error and pay the costs and expenses thereof, shall enter an order that such person be allowed to prosecute his writ of error as a poor person and thereupon all necessary costs and expenses incident to such writ of error, including all court costs, stenographic services and printing, but not including fees or compensation for legal services, shall be paid by the county in which the conviction was had, upon the approval of the judge of such court.

CHAPTER 110:

§ 259.70A (Supreme Court Rule 70A). Record on writ of error—Criminal cases

In all criminal cases in which writ of error is brought, the bill of exceptions or report of proceedings at the trial, if it is to be incorporated in the record on review, and other proceedings

which the plaintiff in error desires to incorporate in the record on review, shall be procured by the plaintiff in error and submitted to the trial judge or his successor in office for his certificate of correctness, and filed in the trial court within one hundred (100) days after judgment was entered, or within such period thereafter as shall, during such one hundred (100) days, be fixed by the court, or in such further time as may be granted within any extended time. If it is impossible to procure the certificate of the trial judge within such time or extended time because of sickness, or other disability, or because, after a reasonable effort he cannot be found at his office, or where he is customarily to be found in the county, then if such bill of exceptions or report of proceedings is presented in apt time to any other judge of said court, it shall be marked "presented"; and if such bill of exceptions or report of proceedings be not signed and filed on the date presented, or within the time fixed or such extended time by the trial court, it may be signed by the trial judge after the date at which it was marked "presented," and shall be filed *nunc pro tunc* as of the date presented.

APPENDIX B

BASES FOR REVERSALS IN CRIMINAL CASES IN ILLINOIS SUPREME COURT DURING CALENDAR YEARS 1953 AND 1954

1953

Cases in which reversals were predicated upon materials contained in a bill of exceptions:

People v. *Rogers*, 413 Ill. 554, 110 N.E. 2d 201
Improper admission of testimony relating to oral confessions without preliminary hearing on whether confession was voluntary; other evidence insufficient to support conviction.

People v. *Kirkpatrick*, 413 Ill. 595, 110 N.E. 2d 519
Improper admission of former convictions; improper admission of exhibits to jury room; improper selection of jurors.

People v. *Bennett*, 413 Ill. 601, 110 N.E. 2d 175
Improper action of court in calling witness for prosecution, and improper examination of witness by prosecutor; improper admission of evidence.

People v. *Gonzales*, 414 Ill. 205, 111 N.E. 2d 106
Evidence insufficient to justify conviction.

People v. *Becker*, 414 Ill. 291, 111 N.E. 2d 491
Evidence insufficient to justify conviction.

People v. *Gonzales*, 414 Ill. 408, 111 N.E. 2d 307
Evidence insufficient to justify conviction.

People v. *Pruszewski*, 414 Ill. 409, 111 N.E. 2d 313
Improper exclusion of evidence. [Death sentence for murder.]

People v. *Williams*, 414 Ill. 414, 111 N.E. 2d 343
Evidence insufficient to justify conviction.

People v. *Bush*, 414 Ill. 441, 111 N.E. 2d 326
Evidence insufficient to justify conviction.

People v. *Marino*, 414 Ill. 445, 111 N.E. 2d 534
Improper and prejudicial conduct by trial judge.

People v. *Rogers*, 415 Ill. 343, 114 N.E. 2d 398
Evidence insufficient to justify conviction.

People v. *Kirkendall*, 415 Ill. 404, 114 N.E. 2d 459
Erroneous refusal of a requested charge; improper argument to jury by prosecutor.

People v. *Tamborski*, 414 Ill. 466, 114 N.E. 2d 649
Motion for discharge for non-prosecution improperly denied.

People v. *Gilbreath*, 1 Ill. 2d 306, 115 N.E. 2d 758
Evidence insufficient to justify conviction.

People v. *Childress*, 1 Ill. 2d 431, 115 N.E. 2d 794
Erroneous admission of evidence [death sentence for murder].

People v. *Stanton*, 1 Ill. 2d 444, 115 N.E. 2d 630
Improper cross-examination of witness by prosecutor.

People v. *Adams*, 1 Ill. 2d 446, 115 N.E. 2d 774
Improper cross-examination of defendant by prosecutor.

People v. *King*, 1 Ill. 2d 496, 116 N.E. 2d 623
Erroneous denial of motion to vacate death sentence entered after plea of guilty where reason to believe defendant had been misled into pleading guilty by prosecutor's promise of leniency.

Cases in which clerks mandatory record would apparently have been sufficient:

People v. *Johnson,* 415 Ill. 628, 114 N.E. 2d 667
Sentence invalid because it was not "indeterminate" as required by statute.

People v. *Kirilenko,* 1 Ill. 2d 90 115 N.E. 2d 297
Defendant involuntarily absent from courtroom when final judgment and sentence entered.

Case in which we are in doubt:

People v. *Howarth,* 415 Ill. 499, 114 N.E. 2d 785
Evidence insufficient to justify conviction for criminal contempt.

1954

Cases in which reversals were predicated upon materials contained in a bill of exceptions:

People v. *Coli,* 2 Ill. 2d 186, 117 N.E. 2d 777
Unreasonable limitation of cross-examination; prejudicial remark by trial judge.

People v. *Temple,* 2 Ill. 2d 266, 118 N.E. 2d 271
Erroneous denial of motions by defendants to withdraw pleas of guilty.

People v. *Albea,* 2 Ill. 2d 317, 118 N.E. 2d 277
Erroneous admission of evidence.

People v. *Hiller,* 2 Ill. 2d 323, 118 N.E. 2d 11
Erroneous admission of evidence.

People v. *Lueder,* 3 Ill. 2d 487, 121 N.E. 2d 743
Evidence insufficient to justify conviction.

People v. *Schwartz,* 3 Ill. 2d 520, 121 N.E. 2d 758
Error in striking certain testimony of defendant.

People v. *Jordan*, 4 Ill. 2d 155, 122 N.E. 2d 209
Evidence insufficient to justify conviction.

People v. *Rezek*, 4 Ill. 2d 164, 122 N.E. 2d 272
Admission of incompetent and prejudicial evidence.

People v. *Fryman*, 4 Ill. 2d 224, 122 N.E. 2d 573
Erroneous refusal of certain of defendant's requests for charge to jury.

People v. *Gardner*, 4 Ill. 2d 232, 122 N.E. 2d 578
Improper and erroneous instructions to jury.

People v. *Hundley*, 4 Ill. 2d 244, 122 N.E. 2d 568
Erroneous admission of evidence.

People v. *Freedman*, 4 Ill. 2d 414, 123 N.E. 2d 317
Improper and prejudicial argument to jury by prosecutor.

Cases in which we are in doubt:

People v. *Loughran*, 2 Ill. 2d 258, 118 N.E. 2d 310
Evidence did not justify conviction; due process violated because lower court considered improper matters in arriving at order adjudging defendant guilty of criminal contempt.

APPENDIX C

The following states provide free transcripts to all paupers convicted of felonies:

Alabama: Ala. Code, Tit. 45 § 69 (1953 Supp.).
Arizona: Ariz. Code Ann. § 44-2525 (1939).
Arkansas: Ark. Stat. Ann. § 22-357 (1947).
California: Gov. Code. § 69952 (1955).
Delaware: Letter from court official.
Florida: Fla. Stat. Ann., Tit. 45, § 924.23 (1944).
Georgia: Letter from Deputy Clerk of the Supreme Court.
Idaho: Idaho Code § 1-1105 (1955 Supp.).
Indiana: Ind. Stat. Ann. § 4-3511 (Burns, 1946).
Iowa: Iowa Code Ann. § 793.8 (1950).
Kentucky: Ky. Rev. Stat. §§ 28.440(1), 28.450(2), 28.460(2)(a)(1953).
Louisiana: Letter from Clerk of the Louisiana Supreme Court.
Michigan: Mich. Stat. Ann. § 27.341.
Mississippi: Miss. Code Ann. § 1640 (1944).
Missouri: Mo. Rev. Stat. § 485.100 (1953 Supp.).
Montana: Mont. Rev. Code § 93.1904 (1949).
Nebraska: Neb. Rev. Stat. § 24-342 (1949).
Nevada: Nev. Comp. Laws § 11029.03 (1950).
New Hampshire: Letter from Clerk of Supreme Court.
New York: N. Y. Crim. Code, Tit. 66, § 456 (McKinney 1955 Supp.).
North Carolina: N. C. Gen. Stat. § 7-89 (1953).
Ohio: Ohio Rev. Code Ann. § 2301.24 (1954).
Oklahoma: Okla. Stat. Tit. 20, § 111 (Supp. 1953).
Pennsylvania: Pa. Stat. Ann. Tit. 17, §§ 1809, 1810

(Purdon, 1930), as clarified by letter from Prothonotary of Supreme Court of Pennsylvania, Eastern District.

South Carolina: S. C. Code § 15-1903 (1952).

Texas: Texas Code Crim. Proc., Art. 760(6) (Vernon, 1950).

Utah: Utah Code Ann. § 78-56-8 (1953).

West Virginia: W. Va. Code § 5251(1) (Michie 1949).

Wisconsin: Wisc. Stat. § 252.20 (1953), as amplified by letter from State Assistant Attorney General.

In the following states it is within the discretion of the court whether or not to grant a free transcript to convicted indigents:

Connecticut: Letter from Chief Justice Supreme Court of Errors. (Mandatory in conviction for first degree murder; discretionary for other crimes.)

Massachusetts: Mass. Acts and Resolves, 1955, c. 352 amending Mass. Ann. Laws, c. 278, §§ 33A and 33B.

North Dakota: N.D. Rev. Code, § 27-0606 (1943).

Oregon: Ore. Rev. Stat. § 21.470 (1953).

Rhode Island: 55 R. I. 141, 179 Atl. 130 (1935).

South Dakota: S.D. Code § 34.3903 (1939).

Washington: Wash. Rev. Code § 2.32.240 (1951).

The following states grant a free transcript in cases of particular crimes or sentences:

Illinois: Ill. Rev. Stat. 1953, c. 38, sec. 769a. (Where sentence is death.)

Maine: Maine Rev. Stat. 1954, c. 148, sec. 31. (Where convicted of murder.)

Maryland: Md. Ann. Code 1951, Art. 5, sec. 89. (Where sentence is death.)

New Jersey: N. J. Stat. Ann. 1953, Title 2A, sec. 152-16. (Where sentence is death.)

New Mexico: No statutory provision. Letter from Assistant Attorney General says policy of court is to refuse free transcript in all but capital cases. However, a full appeal is available on a stipulated bill of exceptions, or statement of facts.

Vermont: Vt. Rev. Stat. 1947, sec. 1421. (Where penalty provided by statute is death or imprisonment for ten years or more, presiding judge may, in his discretion, order free transcript.)

In the following states a full criminal appeal is available to indigents without a free transcript:

New Mexico: See above.

Tennessee: Letter from State Advocate General states that majority of all criminal appeals come to the Supreme Court on a narrative bill.

Virginia: Letter from Clerk of the Supreme Court of Appeals states that a stipulation of testimony, affidavits, or a narrative statement will suffice for a full appeal.

Correspondence with the following two states indicates that they make no provision for providing a free transcript to indigents convicted of crime:

Colorado: Letter from Clerk to the Supreme Court.

Kansas: Letter from Deputy Clerk, Supreme Court.

We have not been able to determine the law in the following state:

Minnesota: Compare *State* v. *Lorenzo,* 235 Minn. 221, 50 N.W. 2d 270 (1951) with *State* v. *Fellows,* 98 Minn. 179, 107 N.W. 542, 108 N.W. 825 (1906).
Wyoming: Letter from Asisstant Attorney General.

Military Courts:

For an account of how Federal military justice automatically provides free transcripts and appeals with no distinction between rich and poor. see Wigmore, *Some Lessons for Civilian Justice to be Learned from Military Justice,* 10 J. Crim. Law and Criminology 170, 173 (1919).

Other Common Law Jurisdictions:

England. Where necessary for an appeal, the Court of Appeals will order that the transcript of shorthand notes at the trial be supplied to an indigent appellant free of charge, and the cost will be paid out of moneys provided by Parliament. See Criminal Appeal Act 1907, 7 Edw. VII, c. 23, Sec. 16; Criminal Appeal Rules 1908, S.R. & O. No. 227, Rules 5 and 39, 1948 Rev., V. p. 352; and *R.* v. *Davis,* 11 Cr. App. Rep. 52, C.C.A. (1914).

Northern Ireland. Practically the same provisions as in England. See Criminal Appeal (Northern Ireland) Act 1930, 20 & 21 Geo. V, c. 45, sec. 15; and Criminal Appeal (Northern Ireland) Rules 1931, S.R. & O. No. 319, Rules 17 and 18, 1948 Rev., V. p. 419.

Scotland. Substantially the same as in England. See Criminal Appeal (Scotland) Act 1926, 16 and 17 Geo. V, c. 15, sec. 11; Rules in 1926 S.R. & O. No. 1373, sec.

3, 1948 Rev. XI, p. 532; and Act of Adjournal of Mar. 22, 1935, S.R. & O., 1948 Rev., XI, p. 547.

Canada. The Criminal Code of Canada, 2-3 Eliz. II, 1953-54, c. 51, secs. 588, 589, 590, provides authority for the Court of Appeals either to order a free transcript or dispense with it where not necessary. See Stat. of Can. 1943, c. 23, sec. 32; 1930, c. 11, Sec. 29; 1923, c. 41, sec. 9. Since the Canadian criminal appellate procedure adopted in 1923 derived largely from the English Criminal Appeal Act of 1907, *supra,* the decisions of the English courts have very strong persuasive authority in Canada; and the English practice of providing free transcripts at the Crown's expense to poor appellants also prevails in Canada. Tremeear's Annotated Crim. Code, 1944, pp. 1291, 1334.

New Zealand. Unlike the English Act of 1907, New Zealand, at least as of 1950, has no requirement that stenographic notes be taken, and the trial Judge's notes still provide a basis for review; these notes may be supplied by the judge at his own instance or on request of the Court of Appeal, and may be supplemented by reference to such other evidence of what took place at the trial as the Court of Appeal may think fit. Garrow, *Criminal Law in New Zealand,* 3rd Ed. 1950, p. 379. See Criminal Appeal Act 1945, 9 Geo. VI, 1945 No. 23, sec. 8; see also secs. 10 and 13, *ibid.,* and Rule 10 of the Criminal Appeal Rules (Serial No. 1946/94, Garrow, *supra,* pp. 388-89).

Australia. We have not been able to ascertain the federal or state practice but since each state is said to have legislation similar to England's Criminal Appeal Act of 1907, *supra,* it would not be unlikely to find that

the English practice on indigent appeals under that Act is also followed. See Barry, Paton, and Sawer, *The Criminal Law in Australia* (English Studies in Criminal Science), 1948, p. 72.

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